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Supreme Court of the United States

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1951

CERTIORARI GRANTED DECEMBER 11, 1951

SUPREME COURT OF THE UNITED STATES

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[Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and Proceedings Before the Honorable Willis W. Ritter, Judge of the United States District Court for the District of Utah, Presiding in the Following-Entitled Cause:

No. 1558—Civil

LEROY J. ROBERTSON, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

AMENDED COMPLAINT—Filed June 12, 1950

Comes now the plaintiff in the above-entitled action and for his cause of action against the defendant above named alleges:

1. Plaintiff now is and was at all times hereinafter mentioned a resident of the State of Utah. That he is a taxpayer within the Internal Revenue District of the State of Utah.

2. That on or about the 15th day of January, 1948, the said plaintiff filed with the Collector of Internal Revenue for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income of $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income was the following, "Henry H. Reichold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be on said return, as follows: $161.58 by withholding from salary and $959.98 by check paid to said Collector of Internal Revenue for the District of Utah on or about January 15, 1948.

[fol. 2] 3. That attached to the aforesaid return of the plaintiff was the following statement, to-wit:

"In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000.00 to the

person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939 had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the taxpayer was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

"The taxpayer has submitted the facts in connection with this award to the Commissioner of Internal Revenue for a ruling as to the taxability thereof, and by letter dated January 8, 1948, the said Commissioner ruled that the entire award was taxable.

"The taxpayer believes that the Commissioner's ruling is in error on the basis of the decision of the Circuit Court of Appeals for the District of Columbia, in McDermott vs. Commissioner, 150 F.(2d) 585, and other rulings and decisions and intends to submit the matter further to the Commissioner on claim for refund or otherwise.

"Assuming but not admitting the Commissioner's ruling to be correct, the taxpayer claims the benefits of Section 107 Internal Revenue Code and has computed the tax as though the said $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. [fol. 3] This computation shows a total tax for said years of $1,121.56, as follows:"

[Computation omitted.]

4. That on the 16th day of February, 1948, the plaintiff filed Claim for Refund of the said $1,121.56 with the said Collector of Internal Revenue for the District of Utah alleg-

ing that the claim should be allowed for the following reasons:

"'In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000 to the person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.'

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939, had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the taxpayer was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

"Neither Mr. Reichhold, the music award committee nor the Detroit Symphony Orchestra derived any profit from the contest or from the taxpayer's participation in it. The purpose as shown by the quotation in the first paragraph hereof, was to give, not to employ. This fact *inter alia* distinguishes the award made to the taxpayer from prizes offered in contests operated for commercial purposes.

"The award was not given by the donor to the taxpayer in exchange for the right to capitalize on his opus. The composition remained and remains the property of the tax-
[fol. 4] payer and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures etc., the right to first performance and the right to designate the publisher of the composition.

"The taxpayer's dominant motive in composing the 'Trilogy' was not in the hope of financial gain primarily. Like a great poet who is inspired to write an immortal poem, the taxpayer, desiring to make an outstanding contribution to the field of music, wrote this 'Trilogy' with no thought of entering it in a contest or otherwise commercializing on it and not until long after it was written was he prevailed

upon to enter it in the Reichhold contest and received eventually the prize-winning award.

"Under the decisions in McDermott vs. Commissioner, 150 F.(2d) 585 and Pauline C. Washburn, 5 T. C. 1333 the award received by the taxpayer does not constitute taxable income to him."

5. That more than six months have elapsed since the filing of said Claim for Refund.

6. That on or about October 24, 1949, the Commissioner of Internal Revenue assessed deficiency tax against this plaintiff for the year 1947 in the amount of $4,605.55, plus accrued interest of $444.34 or a total sum of $5,049.89. This tax and interest was paid to the Collector of Internal Revenue, Salt Lake City, Utah, on the 7th day of November, 1949.

7. The principal cause of the above mentioned deficiency was the taxing of the aforesaid award of $25,000.00 at the rates prevalent for the 36 months ending December 31, 1947, rather than at the rates used for the 36 months ending December 31, 1939, as shown on the return.

8. That on the 22nd day of November, 1949, the plaintiff filed an amended and supplemental claim for refund of $6,171.45 with the Collector of Internal Revenue for the District of Utah, alleging that the claim should be allowed for the following reasons:

[fol. 5] "In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000 to the person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.'

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939, had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the

taxpayer was presented by Mr. Reichhold the award of $25,000 on December 14, 1947.

"Neither Mr. Reichhold, the music award committee nor the Detroit Symphony Orchestra derived any profit from the contest or from the taxpayer's participation in it. The purpose as shown by the quotation in the first paragraph hereof, was to give, not to employ. This fact *inter alia* distinguishes the award made to the taxpayer from prizes offered in contests operated for commercial purposes.

"The award was not given by the donor to the taxpayer in exchange for the right to capitalize on his opus. The composition remained and remains the property of the taxpayer and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures etc., the right to first performance and the right to designate the publisher of the composition.

"The taxpayer's dominant motive in composing the 'Trilogy' was not in the hope of financial gain primarily. Like a great poet who is inspired to write an immortal poem, the taxpayer, desiring to make an outstanding contribution to the field of music, wrote this 'Trilogy' with no thought of entering it in a contest or otherwise commercializing on it [fol. 6] and not until long after it was written was he prevailed upon to enter it in the Reichhold contest and received eventually the prize-winning award.

"Under the decisions in McDermott vs. Commissioner, 150 F. (2d) 585 and Pauline C. Washburn, 5 T. C. 1333 the award received by the taxpayer does not constitute taxable income to him.

"If any part of the said $25,000 constitutes taxable income to the taxpayer, the Commissioner has erroneously computed the amount of tax under Section 107 of the Internal Revenue Code and Section 29.107-2 of Regulations 111 by computing said tax as though the sum received was attributable to the years 1945, 1946 and 1947 rather than to the period preceding the taxable year in which the work on the composition was performed, to-wit; the years 1937, 1938 and 1939."

9. That more than six months have elapsed since filing of said amended and supplemental claim for refund; that

the Commissioner of Internal Revenue has not rendered a decision on said claim.

10. Plaintiff alleges that he had no taxable net income during the said year 1947 and that the said $25,000 was erroneously included in gross income in his said return and that the deficiency tax as above mentioned was erroneously computed and determined by the said Commissioner of Internal Revenue for the reasons set forth in the claims for refund hereinabove set forth.

Wherefore, plaintiff demands judgment against the defendant for the sum of $6,171.45 together with interest thereon as provided by law and for his costs and disbursements in this action.

LeRoy J. Robertson, Plaintiff. S. E. Blackham, Clyde D. Sandgren, Attorneys for Plaintiff.

(Duly verified.)

[fol. 7] Service (omitted in printing)

In United States District Court

Answer to Amended Complaint—Filed June 30, 1950

Now comes the defendant, United States of America, through its attorney, Scott M. Matheson, United States Attorney for the District of Utah, and answering the amended complaint:

1. Admits the allegations of paragraph numbered 1 thereof.

2. Admits the allegations of paragraph numbered 2 thereof except to deny that the plaintiff's income tax return for the calendar year 1947 was filed on January 15, 1948, and that the sum of $959.98 was paid on January 15, 1948.

Defendant affirmatively alleges that the plaintiff's income tax return for the calendar year 1947 was filed on February 5, 1948, instead of on January 15, 1948, as alleged by the plaintiff, and that the sum of $959.98 was paid to the Collector on January 22, 1948, instead of on January 15, 1948, as alleged by the plaintiff.

3. Admits the allegations of paragraph numbered 3 thereof but does not admit the allegations of the statement set forth in the said paragraph 3 and which statement was attached to the plaintiff's income tax return for the year 1947.

4. Admits that on February 16, 1948, the plaintiff filed a claim for refund of the amount of $1,121.56 with the Collector of Internal Revenue for the District of Utah setting forth in such claim the grounds for recovery, but the defendant denies each and every allegation so set forth in such claim for refund.

[fol. 8] 5. Admits the allegations of paragraph numbered 5 thereof.

6. Admits the allegations of paragraph numbered 6 thereof.

7. Admits the allegations of paragraph numbered 7 thereof.

8. Admits that the plaintiff filed an amended and supplemental claim for refund with the Collector of Internal Revenue for the District of Utah setting forth in such claim its grounds for recovery, but denies each and every other allegation of paragraph numbered 8 thereof and also denies each and every allegation set forth in such claim for refund.

9. Admits the allegations of paragraph numbered 9 thereof.

10. Denies the allegations of paragraph numbered 10 thereof.

Wherefore, the defendant prays for judgment dismissing the amended complaint together with the costs and disbursements of this action.

Scott M. Matheson, United States Attorney, Attorney for the Defendant.

IN THE UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

[Paragraph 1 of the stipulation of facts is identical with paragraph 1 of the amended complaint, printed page 1.]

2. That on or about the 5th day of February, 1948, the said plaintiff filed with the Collector of Internal Revenue

for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income [fol. 9] was the following, "Henry H. Reichhold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be due on said return, as follows: $161.58 by withholding from salary and $959.98 by check dated January 15, 1948, which check was deposited by the said collector on January 22, 1948.

[Paragraph 3 to 9, inclusive, of the stipulation of facts are identical with paragraphs 3 to 9, inclusive, of the amended complaint, printed pages 2 to 6.]

[The filing date of the stipulation of facts is not set out in the typewritten record, although it appears it was filed on July 27, 1950. See printed page 80 this record.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed August 28, 1950

1. Plaintiff now is and was at all times hereinafter mentioned a resident of the State of Utah. That he is a taxpayer within the Internal Revenue District of the State of Utah.

2. The plaintiff is by profession a musician and composer, and at the present time is Professor of Music at the University of Utah. That during the year 1947 and for many years prior thereto he was similarly employed at the Brigham Young University, Provo, Utah.

3. During plaintiff's career in his profession he has composed many musical compositions, it having been his habit and custom upon the completion of one such composition to file it away and shortly thereafter commence another work. He completed a composition in the summer of 1936 and during the late summer or early fall of that year commenced work on a symphony which was to be called "Trilogy." He continued work on this latter composition in his spare time during the remainder of the year 1936 and through the years 1937, 1938 and 1939 and completed the

work during the latter part of December, 1939. Upon completion of this work it was also filed away by the plaintiff. [fol. 10] 4. In the year 1945 Mr. Henry H. Reichhold, an industrialist and apparently one of the important philanthropists of this country, and who was also president of the Detroit Symphony Orchestra, offered three awards of $25,000.00, $5,000.00 and $2,500.00, respectively, for the best symphonic works written by native-born composers of North, Central and South America. The purpose, terms, and conditions of the award are set forth in plaintiff's Exhibits No. 1 and 2, which by reference are made a part hereof. The broad purposes underlying the award are set forth on the title page of Exhibit No. 1 as follows:

"The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorius new work for full symphony orchestra by a native composer of the Americas.

"It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American Countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

"The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas."

5. After announcement of the contest the plaintiff was urged to enter his composition "Trilogy" but he did not do so as the original announcement (Exhibit 1) required that "parts must accompany each score." Plaintiff had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts. However, when the "Amendments to the Reichhold Music Award [fol. 11] Contest Rules" (Exhibit 2) deleted the requirement that parts must accompany the score plaintiff decided to enter his composition and did so on or about February

18, 1946, by filing an official entry blank, a copy of which, as executed by the plaintiff is part of Plaintiff's Exhibit 1 attached hereto.

6. The compos-tion entered by the plaintiff was selected by the award committee, set up by Mr. Reichhold, as the best composition submitted and the plaintiff was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

7. The plaintiff, LeRoy J. Robertson, did not produce the composition "Trilogy" for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to "give"—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures, etc.; the right to first performance and the right to designate the publisher of the composition.

8. On or about the 5th day of February, 1948, the said plaintiff filed with the Collector of Internal Revenue for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income of $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income was the following, "Henry H. Reichhold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be due on said return, as follows: $161.58 by withholding from salary and $959.98 by check dated January 15, 1948, [fol. 12] which check was deposited by the said Collector on January 22, 1948.

[Paragraphs 12 to 14, inclusive, of the findings of fact are identical with paragraphs 3, 4 and 6 of the amended complaint which are printed at pages 2 to 4.]

[Paragrahs 12 to 14, inclusive, of the findings of fact are identical with paragraph 7, 8 and 9 of the amended complaint which are printed at pages 4 to 6.]

Conclusions of Law

That the award of $25,000 to the plaintiff by Henry H. Reichhold in the taxable year constituted a gift and is not includible in plaintiff's income for the year 1947 or any other year, by virtue of the provisions of Section 22 (b) (3) of the Internal Revenue Code.

That the plaintiff is entitled to recover of and from the defendant the sum of $6,171.45 together with interest according to law.

By the Court:

Willis W. Ritter, Judge.

In United States District Court

Judgment

The Court having heretofore filed its Findings of Fact and Conclusions of Law herein and it being considered by the Court that the plaintiff should recover herein, in pursuance thereof, it is considered and adjudged by the court that the plaintiff above named do have and recover of and and from the defendant, United States of America, the principal sum of Six Thousand One Hundred Seventy One and 45/100 Dollars ($6,171.45), together with interest thereon as provided by law.

Done and adjudged at Salt Lake City, Utah, this 28th day of August, 1950.

[fol. 13] Willis W. Ritter, Judge.

Filed August 28, 1950.

Clerk's Note: Notation of entry of Judgment made on docket sheet August 28, 1950, in accordance with Rule 79 of Rules of Civil Procedure.

In United States District Court

Motion for New Trial—Filed September 5, 1950

Comes now the defendant, United States of America, and moves that the Court grant a new trial in this action upon the following grounds, to-wit:

1. That the Findings of Fact do not support the Conclusions of Law.

2. That the Conclusion of Law that the award of $25,000.00 to the plaintiff by Henry H. Reichhold in the taxable year constituted a gift and is not includible in plaintiff's income for the year 1947 or any other year is in error and against the law.

Scott M. Matheson, United States Attorney; Bryan H. Croft, Assistant United States Attorney.

Clerk's Note: Affidavit of Mailing by the United States Attorney's Office filed September 5, 1950.

In United States District Court

Minute Entry Denying Motion for New Trial—Dated September 29, 1950.

On this 29th day of September, 1950, plaintiff appearing by S. E. Blackham, his attorney, and defendant by Bryant H. Croft, Assistant United States Attorney, and the matter came on for hearing on motion for new trial. The court heard arguments of counsel and good cause appearing denied defendant's motion.

[fol. 14] In United States District Court

Notice of Appeal—Filed November 28, 1950

Notice Is Hereby Given that the United States of America, defendant above-named, hereby appeals to the Court of Appeals for the Tenth Circuit from the final judgment entered in this action on August 28, 1950 and from that order entered September 29, 1950 denying this defendant's

motion for a new trial, which motion was filed September 5, 1950.

Scott M. Matheson, Bryant H. Croft, Attorneys for Appellant, United States of America.

Clerk's Note: Copy of Notice of Appeal mailed by the Clerk of the United States District Court to counsel for the plaintiff in accordance with the Rule of Civil Procedure.

In United States District Court

Statement of Points—Filed February 7, 1951

The defendant above named, having appealed from the judgment made and entered herein, states that he intends to rely on appeal upon the following points, namely:

(1) That Finding No. 7 is not supported by the evidence.
(2) That Finding No. 7 is contrary to the evidence.
(3) That the judgment entered herein was contrary to the law and the evidence.

Done at Salt Lake City, Utah, this 7th day of February, 1951.

Scott M. Matheson, United States Attorney; Bryant H. Croft, Assistant United States Attorney.

Clerk's Note: Affidavit of Mailing by the United States Attorney filed February 7, 1951.

[fol. 15] In United States District Court

Order Extending Time in Which to File Record on Appeal—Filed January 7, 1951

Upon application of the defendant and appellant, United States of America, and good cause appearing therefor,

It Is Hereby Ordered that the defendant and appellant, United States of America, may have to and including the 27th day of February, 1951 within which to file and docket the record on appeal in the United States Court of Appeals, Tenth Circuit.

Dated this 5th day of January, 1951.

Orie L. Phillips, Judge, United States Court of Appeals, Tenth Circuit.

In United States District Court

Docket Entries Relating to the Proceedings

1-24-49—Complaint filed. Summons and copies issued. Summons filed showing service on U. S. Attorney and two copies mailed to Attorney General at Washington, D. C.

2-3-49—Return receipt signed by Attorney General filed.

3-25-49—Stipulation filed that defendant may have to and including May 24, 1949, in which to answer or otherwise plead. Order signed by Judge Johnson in accordance with stipulation.

5-24-49—Stipulation filed that defendant may have to and including June 24, 1949, in which to answer or otherwise plead.

6-12-50—Amended complaint filed.

6-30-50—Answer to amended complaint filed.

7-27-50—On motion of Bryant H. Croft, Mr. William Waldo admitted to practice for this suit. Case called for [fol. 16] pretrial. Issues summarized. Order to be prepared and presented for signature. Called for trial without a jury. Stipulation of facts filed and read into record. Documentary evidence introduced. LeRoy J. Robertson sworn and examined. Plaintiff rests. Defendant rests. Court heard arguments of counsel and hands down oral opinion in favor of plaintiff for $6,171.45 plus interest at legal rate. Findings of Fact, Conclusions of Law and Judgment to be prepared and presented for signature.

7-31-50—Reporter's transcript of oral decision filed.

8-3-50—Pretrial order signed by Judge Ritter and filed.

8-28-50—Direction to enter Judgment.

8-28-50—Findings of Fact and Conclusions of Law and Judgment in favor of plaintiff and against United States for $6,171.45 signed by Judge Ritter and filed. Notice of entry mailed to S. E. Blackham, attorney for plaintiff and U. S. Attorney.

9-5-50—Motion for new trial filed by defendant. Affidavit of mailing filed.

9-29-50—Called for hearing on motion for new trial. Court heard arguments of counsel and denied defendant's motion. Notice of entry mailed counsel.

11-28-50—Notice of Appeal filed by defendant. Copy of

notice mailed to S. E. Blackham, plaintiff attorney at Provo, Utah.

12-12-50—Reporter's transcript of testimony filed.

1-8-51—Order signed by Judge Phillips and filed extending time to docket appeal in the U. S. Court of Appeals, Tenth Circuit until February 27, 1951.

2-7-51—Statement of points filed by defendant. Defendant's designation of Record on appeal filed. Affidavit of mailing filed.

[fol. 17] In United States District Court.

Transcript of Trial Proceedings

Salt Lake City, Utah, Thursday, July 27, 1950: 10 A. M.

Appearances:

Mr. S. E. Blackham, attorney for plaintiff; Mr. William Waldo, Special Assistant to the Attorney General, Mr. Bryant S. Croft, Assistant United States Attorney, attorneys for defendant.

Mr. Croft: I would like to introduce Mr. William Waldo, Special Assistant to the Attorney General, and ask that he be associated with us in this case.

The Court: It may be done.

Statement

Mr. Blackham: If the court please, this is a tax case involving a claim for refund on behalf of the plaintiff, LeRoy J. Robertson, arising out of an assessment by the Commissioner of Internal Revenue of certain taxes upon income received by Mr. Robertson and including in income the sum of twenty-five thousand dollars which Mr. Robertson received in the year 1947 from the Reichhold Music Award Committee in connection with the Detroit Symphony Orchestra, having included that income of Mr. Robertson's in the year 1947.

It is our contention, if the court please:

First, that this award received by Mr. Robertson was not income as contemplated by the Revenue Code, Section 22,

and particularly was exempt under the provisions of Section 22-b, I believe, which exempts from the inclusion in income all gifts.

In preparing the return of Mr. Robertson we included in the return this twenty-five thousand dollars, with the notation on the return that this was included over our objection, that it was not income, and then we computed the income on the basis of what we thought were the provisions of Section 107 of the Internal Revenue Code, 107-b, which permits the allocation of income under certain circumstances back to the period of thirty-six months, with which your Honor is well acquainted, I am sure.

[fol. 18] Now, we will attempt to prove to the court here that the work on this musical composition out of which the twenty-five thousand dollar award arose was done entirely by Mr. Robertson, starting in the late summer or early fall of 1936, and being completed in its entirety in the latter part of December of 1939.

In computing the tax for the year 1947 we pushed that income back into the last thirty-six months of that period, so that it actually was pushed back into the years 1937, 1938 and 1939, and made our return on that basis, and paid the tax in the sum of eleven hundred dollars shown to be due on the return.

Shortly after that we filed a claim for refund with the Commissioner of Internal Revenue, and it was not acted upon within the six months period, so we filed suit in this court to recover that particular payment of the tax.

While this suit was pending the Bureau instituted an investigation of the tax and determined an additional assessment of some four thousand odd dollars, and that arose principally, with the exception of some five hundred dollars which were adjustments to which we agreed, the entire deficiency arose out of a computation of this sum of twenty-five thousand dollars, allocating it entirely to the years 1947, 1946 and 1945.

It will be our contention, if the court please, that in the first place the amount, or no part of it, is includible as income; that it was a gift within the contemplation of the Revenue Act, and was in fact a gift.

Secondly, that if it is includible in income, that the Bureau has now allocated that sum back to years which have

absolutely no relation whatever to the years in which the work was performed which brought in this twenty-five thousand dollars, and is contrary to Section 107 of the Internal Revenue Act, and is in fact contrary to the regulation 111 of the Treasury Department.

Now, we have agreed to certain formal facts, if the court [fol. 19] please, and we have prepared a statement of agreed facts, setting up those formal facts, leaving only, I believe,—at least from our standpoint, only the testimony of Mr. Robertson as to when this work was performed and the circumstances of submitting the matter, and as to whether there has been any other income received in connection with this work.

Is that fairly stated, from our standpoint, Mr. Waldo?

STATEMENT

Mr. Waldo: Yes, from your standpoint.

And of course I need only say, we intend to contest, on the evidence that we expect, the matter of whether it is a gift or not. We think it does not have all the common law requisite to make a gift.

And, secondly, we are contesting the application of Section 107-b as Mr. Blackham and his client are contending for it.

I may tell your Honor that Mr. Blackham and I were long-time colleagues in Washington when he was down there; we had offices adjoining. So it is a pleasure to me to have an opportunity to see him again, and it is kind of fun to practice law against him,—having so long been an advisor and advisee of Mr. Blackham in the office.

We understood that you were perhaps going to have a preliminary pre-trial here this morning. Mr. Croft told us your practice was to ask us, more or less, if we could, to agree on what the issues to be tried were. So we wrote out a paragraph——

The Court: Well, just state it. I suppose you have already stated those issues.

Mr. Blackham: Yes, I think so.

Mr. Waldo: They are really stated. You can make such issues here as you please.

[fol. 20] (Thereupon, on the statements of counsel, the issues were framed by the court as expressed in the pre-trial order on file herein.)

The Court: Now you have agreed on some facts. I suppose you will file a stipulation on that. I would like to have you read it to me. I am going to decide this case from the bench as soon as you get your case closed.

Mr. Blackham: (Reads from the agreed statement of facts herein.)

(Said statement of agreed facts is in words and figures as follows:)

[Paragraph 1 of the agreed statement of facts is identical with paragraph 1 of the amended complaint, printed page 1.]

[Paragraph 2 of the agreed statement of facts is printed at page 8.]

[Paragraphs 3 to 9, inclusive, are identical with paragraphs 3 to 9 of the amended complaint, printed pages 2 to 6.]

Mr. Blackham: Is it the practice to submit this in evidence?

The Court: Yes. File it.

No objection to the receipt of the stipulation, I assume?

Mr. Waldo: No objection, your Honor.

The Court: It may be received.

LeRoy J. Robertson, the plaintiff herein, called as a witness on his own behalf and having been first duly sworn herein, testified as follows:

Direct examination.

By Mr. Blackham:

Q. Will you state your name, please?

A. LeRoy J. Robertson.

[fol. 21] Q. Where do you reside, Mr. Robertson?

A. 1584 South Fourteenth East, Salt Lake City.

Q. What is your occupation?

A. I am head of the Music Department of the University of Utah.

Q. You are the plaintiff in this action, are you not?

A. I am.

Q. Now, are you the composer of a symphonic composition known as "Trilogy"?

A. I am.

Q. Now, will you tell the court under what circumstances you wrote that work and when that work was started?

A. That work was begun in the latter part of 1936, in the autumn. Of course there are sketches in the work which date some years previously. I hadn't kept track of when the sketches were written. But the intensive work on this composition was begun in the latter part of 1936, in the autumn. And I worked at it when I had any spare time from the time on to the end of the year 1939, at which time it was completed.

Q. May I ask this question. What fixes that date in your mind, Mr. Robertson? Is there any event that fixes the autumn of 1936 in your mind?

A. Yes. In the summer of 1936, I think it was in June, from June to July, I was at the University of Southern California as assistant with Armoe Schinberg (?). (Spelling) the great composer from Vienna, who had recently come to America.

The work I had with that man, the inspiration, whatever you wish to call it, seemed to have given me an urge to write this composition.

I recall distinctly that when I returned from California I received the proofs on my quintette——

Q. That was a prior composition?

A. That is a prior composition which was at that time being published. It was a prize-winning work, being published by the Society for the Advance of American Music. I have a copy of that work here, if you wish to inspect it.

And the dates that I corrected the proofs of that work as indicated on the printed material, the date was in 1936, [fol. 22] and I remember it was in about this time of the year, about August, that I corrected the proofs and sent them back, and immediately upon sending them back I had this impulse then to go with the Trilogy, and got working intensively on it.

Q. And what was your purpose in working on the Trilogy and composing it?

A. That I cannot say. I can not say why the sun comes up. Just an urge to do it. There was no purpose other than it seemed like it had to be done, that was all.

Q. I show you a bulky manuscript, Mr. Robertson, which appears to be the score of the Trilogy, and ask you if that is the composition?

A. Yes, that is a photostat of the original score.

Q. And as such, as it is, is this the way it was presented in the contest?

A. That is the score that went through the contest. It has the number 121, I think, on the front.

Q. And when did you say it was completed?

A. The work was completed in 1939.

Q. Now, the work on that composition was done during what period of time? Did you stay at it continuously, work all the time at it, or was it a sort of part-time undertaking?

A. Well, I was teaching. There were three children in the family. And our income wasn't too large. We had to live. And that was the first thing I had to take care of, naturally. But what time I had, most of the time I worked on this between the hours of ten in the evening and two o'clock in the morning.

Q. Now, did you have any commercial purpose in mind in composing that?

A. None whatever.

Q. Now, when the work was completed what did you do with it?

A. I put it aside and began a string quartette. And other work followed along in due course between that time and '46.

Q. Did you do any more work on the Trilogy?

A. No, I worked on these other compositions.

Q. What if anything in connection with this work occurred in 1945?

A. The announcement was made through the press that [fol. 23] Reichhold was giving this extraordinary award. And I checked through several works I had at the time, and the Trilogy seemed in certain respects to fit into the specifications better than anything I had at the time, so I thought of entering the Trilogy in the contest.

Q. Did you file an application with an official entry blank in the contest?

A. No. I asked for a blank. Then, on getting the blank it stated—the original blank—that parts would have to accompany the score. And in my student days in Boston I had over-worked my eyes so I had to be very careful with budgeting my eye-power, so to speak. So I decided then and there that there was no point in trying to even enter the Trilogy, because I couldn't get out the parts. There was no way of having the parts copied,—here, at least.

Q. Then what happened?

A. Then later an amendment to this original award came out stating that parts would not be required, that the score only would be required.

Then I made investigation as to having photostats made of the score, and on the completion of the information which helped me to adjust the price of the photostats, I decided to have them made.

(Plaintiff's Exhibits 1 and 2 were thereupon marked by the reporter for identification.)

Q. Mr. Robertson, I show you what has been marked Plaintiff's Exhibit 1, and ask you to tell the court what that is.

A. Well, just what it says. It was the Reichhold Music Award,—if that is what you mean.

Q. Is that an announcement or a setting forth of the provisions of the contest?

A. That is correct.

Q. Now, on the back of that appears to be an official entry blank. Now, did you sign a similar blank and turn it in to the contest committee with your Trilogy?

A. That is right.

Q. Now, this Exhibit 1 is not the original of that entry, is it?

A. I suppose Reichhold has that.

[fol. 24] Q. So this is a copy, as near as you can remember it is an exact copy of the original?

A. Yes. I think it includes these amendments, too.

Q. Plaintiff's Exhibit 2 are the amendments of which you speak?

A. That is right. Paragraph 4 says the parts must accompany each score. That was deleted from that.

Q. You submitted your official entry blank under date of February 18, 1946, as shown here on this copy, is that right?

A. There might be one or two days' difference there. I had a letter from Walberg (spelling?), who made the photostats of the work, saying the score had not yet reached them; they were a little anxious that it reach them. And my idea is the score must have crossed the letter, because I had already sent the score to them.

Q. But it was somewhere around that date?

A. Yes, it was near that time.

Mr. Blackham: If the court please, we offer in evidence Plaintiff's Exhibits 1 and 2, which are copies of the original entry blanks, and counsel and I have agreed that we will waive the originals.

The Court: Any objection?

Mr. Waldo: No objection.

The Court: May be received.

(Plaintiff's Exhibits 1 and 2 were thereupon received in evidence.)

Mr. Waldo: I believe I agreed with you that some statements in there might be taken as true, and you agreed with me——

Mr. Blackham: Yes. We have agreed that the allegations of Paragraph 10 in this Exhibit 1, in which it states the Detroit Orchestra, Incorporated, is a non-profit organization of Detroit, Michigan, is a fact, and also that Henry H. Reichhold is the president of the Detroit Symphony Orchestra, and that the purposes are as stated in this exhibit.

[fol. 25] The Court: Who put up the money?

Mr. Robertson: Reichhold, as far as I know.

The Court: Did he put it up as president of the Detroit Orchestra, or out of his own private funds?

Mr. Robertson: As far as I know, he put it up out of his own funds. He was interested in promoting the Detroit Symphony Orchestra.

As all symphony orchestras are, it was a liability finan-

cially for him; but he was president of it, and he was interested in it.

Mr. Blackham: It was a personal award as far as he was concerned.

The Court: What is his business?

Mr. Robertson: Reichhold? I think he has interests in chemicals and dyes throughout the world. He is an excellent violinist.

By Mr. Blackham:

Q. Do you know Mr. Reichhold?

A. I met him when I was in Detroit. I think I met him probably on December 12, 1947, for the first time. My acquaintance with him was on December 12, 13 and 14th of December.

Q. Under what circumstances was that?

A. That is the time I went to receive the award. The work was performed on Thursday, December 11th, in concert, on Friday, December 12th in concert, then was broadcast on December 14th, so it was right in there while I was in Detroit.

Q. The work was performed by the——

A. —Detroit Symphony Orchestra under Karl Krueger.

Q. Do you know whether or not that orchestra is still in existence, Mr. Robertson?

A. No, it is not in existence now.

Q. Do you know when it ceased to be?

A. As I remember, at the end of the season of 1948.

Q. Now, prior to this December 14, 1947, had you received any money from any source whatever in connection with this Trilogy?

A. No, none whatever.

[fol. 26] Q. Subsequent to the receipt of the twenty-five thousand dollars have you received any money in connection with it from any source or for any purpose whatever?

A. No, it has just cost me a little bit. I mean by that, I sent this score to one or two conductors and have sent the score and parts on to Brazil.

Q. Where is the original score at the present time?

A. It is in Brazil,—in Rio de Janeiro.

Q. Tell the court what were the circumstances of taking that there.

A. Last October, I think it was, I received a letter which you have, from some part of the Department of State—isn't that on the envelope? Isn't it from the Department of State officially? Asking that this work be sent to Brazil for performance there.

Q. Pursuant to that request from the State Department, did you send it for that purpose

A. Yes.

Q. Have you received any emoluments at all from that?

A. No, I don't think it has been performed yet. They told me they would send me the clippings when it was done. At the present time I haven't received any clippings. I don't believe they have had time to work it up. They were so close to the end of their season last year. They are in the midst of their season now, so I am hoping they will get around to it. It is up to them.

Q. Did you have any agreement with any person or society that you should be reimbursed in any sense for this work in that connection?

A. None whatever, except since this went I have become a member of ASCAP—American Society of Composers and Publishers. They generally ask a certain amount from all symphonic orchestras; the symphonic orchestras pay a small fee in through ASCAP for the right to perform works of the members.

Since this was sent to Brazil I have become a member of ASCAP. Whatever it is, it will be very little.

Q. At any rate, there has been no promise of any payment to you in that connection?

A. No.

[fol. 27] Q. Have you composed any other works than the Trilogy?

A. Yes, several. Do you wish me to name some of them?

Q. Have you composed any of those works on a commission basis,—that is, commission to do a particular work for a particular purpose and for pay?

A. Only one, and in a sense it was not a commission. That was last year, for the University of Utah, about a year ago now, the administration asked that I prepare an original work for the convocation. And in going over my sketches and work under way I chose a violin concerto.

I asked that I might have five hundred dollars to help with these parts and score and piano reduction. I received that from the Research Foundation of the University of Utah.

My account shows I put about that much money in on it, too.

Q. That is the only time in connection with any of the compositions you have done that you have received any money for?

A. That is right—pardon me, I received a gift of three hundred and fifty dollars on a piano rhapsody in 1945, I think, or 1946 or 1947.

Q. Except that one, you never started work on any composition or have been commissioned to do so with the expectation of getting funds?

A. That is correct.

Q. Do you know whether or not the Trilogy has been synchronized to motion pictures?

A. No, it has not.

Q. Has it been recorded for phonograph?

A. Only private recordings, not commercial.

Q. Any electrical transcriptions on music rolls made of it?

A. No. It has been recorded on records and then on tape.

Q. By private individuals? Has that been done by the Detroit Orchestra, do you know, any of those things?

A. They gave me—I have it in my possession,—a record of the Thursday night performance on December 11th, I think it was, 1947.

Q. But there have not been any recordings or synchronizations for commercial purposes?

A. That is correct.

[fol. 28] Q. Now, Mr. Robertson, Exhibit No. 1 sets forth the terms under which you entered the contest, is that right?

A. That is right.

Mr. Blackham: I believe that is all.

Cross-examination:

By Mr. Waldo:

Q. Mr. Robertson, I think we all understand what a painter means when he speaks of a "sketch",—but just what does a "sketch" in your terminology mean?

A. Well, I suppose the first definition of it would be, perhaps, a melody with certain notations of harmonic voices to accompany it; a motif or something like that.

Q. A theme?

A. We call it a motif; sometimes it is a little longer. We call it a melody.

Q. These things come to you in the way of ideas from time to time, and you just put them down for future use, is that it?

A. Correct.

Q. So that when, as you said, you were commissioned to do something for the convocation, you got out your file of sketches and ran over them to see which of those was most appropriate, and then began to use that material?

A. That is correct in the case of this work you refer to, the violin concerto, because it was well along when they asked for it. One movement, at least, was entirely composed out of the three.

Q. Then when you started this work, you fix the time as when you completed a previous work in the summer of 1936, you already had this file of motifs or sketches that you could begin to review and see what would be appropriate for use in the Trilogy?

A. That is right. That material I looked through. Those things generally come to you without looking through all that may be written. You get leads through your mind, something that is stored in your mind, as well as in your file. Then I consulted some of those files, no doubt. It would be difficult to tell you just how it went about.

Q. Are you one of those happy individuals who has [fol. 29] what musicians call a perfect pitch?

A. No, just approximate that—I think I could come quite close to it; but much more concerned about relative pitch.

Mr. Waldo: I happened to run into that phenomenon once when I was a young man, and I know something about it as a consequence.

The Court: That has not any bearing on this lawsuit.

By Mr. Waldo:

Q. The score had been put away in some fashion at the end of 1939?

A. That is right. It was put in a cupboard.

Q. Ever do any further correcting or changing on it from time to time after that?

A. No. I was busy with other work.

Q. When you decided to enter the contest and see whether it was appropriate, did you make any changes at that time?

A. No.

Q. You submitted it then exactly in the form as when you put it away in 1939?

A. That is right.

Q. I wonder about the significance of these pencil notations. I notice in this score as shown to you by your counsel, for instance what do these X's indicate on this page which I point to you?

A. This indicates at the Salt Lake performance of the Trilogy—that was after the one in Detroit—that we eliminated that measure.

Q. Here is a little notation on the top of another page, and in the middle of "Tempo," I imagine where you decided to change the indicated tempo to another,—is that it?

A. That is right. After having heard about four of five performances of the Trilogy, these were some things I think that have gone into the score to Brazil.

Q. In the score as submitted for the contest it was without that pencil notation?

A. Correct. There was no pencil notation in the score. You can't photostat pencil. If you wish to apply your eraser it will come off. If you photostat it you would have to scrape it off, I imagine.

Q. Here is a page, again, that seems to be scratched up. [fol. 30] A. That was two measures eliminated at the Salt Lake performance.

Q. As concerns the question the court asked you, about the way the money was put up by Mr. Reichhold, as a person or as president of the orchestra, I assume from your answer you really don't know,—it is hearsay as to what you said?

A. Is there anything in the magazine that would give you any clue how it was?

Mr. Waldo: The magazine article would be hearsay, too, I take it, unless you know it of your own knowledge.

A. I really couldn't say. All I know in general is that Mr. Reichhold was giving all he could to sustain the orchestra.

Q. But as far as you are concerned, you haven't any actual knowledge of your own as to that point?

A. I couldn't say whether he got his money from the Detroit Symphony or whether he gave it himself. I would be quite inclined, however, to say that Mr. Reichhold gave that money out of the Reichhold Foundation. Doesn't it say so there some place, "Reichhold Foundation"?

Mr. Waldo: If it does, it speaks for itself in the exhibit. I was just trying to find out if you had any personal knowledge of where the money came from.

Q. Mr. Robertson, do you remember at any time talking to Revenue Agent Galligher, who sits here in the court room?

A. Yes, sir.

Q. About this matter. And what were the circumstances of those conversations?

A. Mr. Galligher came to check on the income tax return filed in relation to this matter, and the income of that particular period.

Q. I asked you a moment ago whether you had done any changing in this work before it was submitted to the award, and you answered "No." Do you remember a conversation with Mr. Galligher in which you gave a different answer to that question?

A. No, I do not.

Q. Do you remember telling him substantially that you made a change in the ending and other bits just before submission?

A. I don't remember that.

[fol. 31] Q. And you now say that it would not be correct?

A. Well, I would like to hear Mr. Galligher's statement on it. I might say this much in relation to it, that if anything was said there, that I made an alternate page in 1939 for this work,—composed it. There were two endings—not two endings—an alternate page just before the ending, and I transferred that page to this copy.

The two endings were written in 1939. It didn't mean any work except transference.

Q. We are striving for accuracy.
A. Well, that would be accurate.

Mr. Waldo: I think that is all.
Mr. Blackham: That is all. That is our case, if the court please.
The Court: All right, Mr. Waldo.
Mr. Waldo: The defendant rests, too.
The Court: All right, I will hear you gentlemen on your legal proposition.

(Argued by counsel for the respective parties.)

ORAL OPINION OF THE COURT

The Court: There is not any question but that Reichhold got no advantage or benefit. There is not any question here, I think, on the record, but that Reichhold intended to award this money to encourage the production of compositions with a view to whatever influence that might have on unity between nations, and for the purpose of encouraging and developing the best American type of music.

It would seem to me there is no question on this record but that the Detroit Symphony Orchestra did get some benefit and advantage; it got a right to play the thing the first time; it got the right to synchronization and mechanical reproduction.

On the other side of it, Mr. Robertson certainly did not compose this production for the purpose of obtaining the [fol. 32] Reichhold award, because his composition was completed in 1939 and he did not enter into the award contest until February 18, 1946. So when he composed this music, rendered this service, he certainly wasn't doing it for this reward, and I think on the record it is highly dubious that he was doing it for any reward other than the satisfaction that comes to an artist from doing those things. Sure, they all hope, inventors, artists, musicians hope that some time this sort of thing will happen to them. I suppose he hoped about the mechanical reproduction and so forth, that that might develop some income. That has not been realized as yet. His composition has been played, according to his testimony, three times; otherwise it has remained in a file somewhere. This kind of composition cannot be produced

without a very expensive symphony orchestra to put on the production. Mr. Robertson received that advantage, but he received that advantage from the Detroit Symphony Orchestra, not from Mr. Reichhold. From Mr. Reichhold he got twenty-five thousand dollars. From the Detroit Symphony Orchestra he got the production of his Trilogy, and I wouldn't be surprised but what Mr. Robertson, or any composer, would regard an opportunity to have his composition played for the first time so he could hear it would seem to him to be about as valuable as the twenty-five thousand dollars.

In return for what the Detroit Symphony Orchestra did they got some advantages: they got the opportunity to play it first; they got the rights spoken of for synchronization and mechanical reproduction, perhaps motion picture rights.

Fundamentally I think this boils down to the question: Was Mr. Reichhold giving, or was he selling? I think it boils down to the question on the other side: Was Mr. Robertson giving, or was he selling?

I do not believe Reichhold or the Reichhold Award Committee was selling anything or buying anything. I think they were giving. I think that was the intention. Appar- [fol. 33] ently Reichhold is one of the important philanthropists of our country. Mr. Robertson says he is engaged in the chemical and dye business all over the world; apparently a man of means, because he is underwriting the activities of the Detroit Symphony Orchestra, has an interest in music, in a philanthropic way attempting to develop good music.

I think the finding should be that Reichhold intended to give, not to buy or sell. I think the finding on the other side should be that Mr. Robertson did not produce this composition for the purpose of selling it to Mr. Reichhold or to anybody else. It was the inspiration of an artist, his desire to do this creative work.

I was interested in the way he expressed it here in a modest sort of way; he hadn't been asked apparently before how he came about doing it, but he said it was just something that had to be done. If creative artists of Mr. Robertson's kind were doing these things only with the expectation of reward I think they would go down town in trade to render their services, because most of them don't ever get very

much for this sort of effort. As a matter of fact the record shows he has not gotten very much for it; it cost him some of his prize money to send it around to publishers and conductors of other symphony orchestras.

I believe that Mr. Robertson's production of this composition was motivated dominantly and primarily for reasons other than monetary. When he entered into this contest I don't think he was intending to sell his production or rights in it; I don't think he was intending to sell his services. I think he was intending to place himself in a position where he might, if he was lucky, be the recipient of a prize award which, on the other side, was intended to be a gift.

I think if there is any exchange of values here, the exchange of values is between the Detroit Symphony Orchestra and Mr. Robertson, and that exchange of values hasn't anything to do with the twenty-five thousand dollar prize. Consideration both ways there. Mr. Robertson got his production played,—a very important advantage to him,—it [fol. 34] cost somebody a lot of money to play that thing; they played it three times, two productions without the radio, then a radio broadcast production. That is a very valuable thing, in return for which the symphony orchestra gets the rights to which the official entry blank refers.

I believe it is the kind of thing—difficult as it is to draw the line—that falls on the side of giving rather than of selling or buying of either services or compensation.

The judgment will be for Robertson for a refund.

Mr. Waldo: There is not any question at all, however, is there, your Honor, that the award committee made the application which is in evidence?

The Court: Oh, no. I am taking the whole record into account in making this decision.

Now, do you want to say anything to me about the money, or are you going to get together and compute that?

Mr. Waldo: It must be about adjournment time——

The Court: We will adjourn when we get through. What normally we would do, we would render judgment in a definite amount of money. You haven't arrived at that yet?

Mr. Waldo: Then can we have a recess for ten minutes?

The Court: Recess for ten minutes.

(After the recess:)

Mr. Blackham: If the court please, the agreed statement of facts shows the amount of tax that was paid, tax and interest of $6171.45, and under the computation here we have agreed that the full amount of the taxes paid for the year are refundable, so the judgment should be for $6171.45.

The Court: Plus interest from the date of payment at the rate of six per cent?

[fols. 35-36] Mr. Waldo: According to law, if you will?

The Court: That is what it is?

Mr. Waldo: Yes.

The Court: Well, according to law.

Mr. Waldo: Then you have both your date of payment and the rate taken care of automatically.

The Court: All right. You agreed to that amount, do you, Mr. Waldo?

Mr. Waldo: The revenue agents assure me there is no taxable income if the award was not taxable, so that would mean the whole amount of tax paid was overpayment.

The Court: The judgment will be for the amount Mr. Blackham states, with interest according to law, as Mr. Waldo suggests.

Mr. Waldo: I suppose you will draw the judgment and submit it to Mr. Croft.

The Court: Prepare your findings and conclusions and judgment and bring them in to me, and before you bring them in go over them with Mr. Croft. If he has any objections that you cannot resolve between yourselves, bring them in to me and I will resolve them for you.

Reporter's Certificate (omitted in printing).

PLAINTIFF'S EXHIBIT No. 1

33

Return to
L. E Blackham
48 No. University Ave.
Provo Utah

REICHHOLD

MUSIC AWARD



SYMPHONY OF THE AMERICAS 1945

The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.

It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations, and also to be helpful in bringing to the public the most important new music written in the Americas.

President of the Detroit Symphony Orchestra

DETAILS OF THE AWARD

Henry H. Reichhold offers the following three awards for the best symphonic works, to be selected as outlined hereafter, written by native-born composers of North, Central and South America:

First Award	$25,000
Second Award	$5,000
Third Award	$2,500

It is planned that each work receiving one of these awards will be broadcast by the Detroit Symphony Orchestra within one year from the date of the award.

In addition, a Certificate of Merit will be awarded to the one outstanding selection from each participating country.

ELIGIBILITY: The Reichhold Music Awards for symphonic composers are open to persons born in the Western Hemisphere and who are citizens of one of the following countries.

Argentina	Colombia	Guatemala	Panama	United States
Bolivia	Costa Rica	Haiti	Paraguay	(Inc. Alaska,
Brazil	Cuba	Honduras	Peru	Puerto Rico &
Canada	Dominican Republic	Mexico	Salvador	Virgin Islands)
Chile	Ecuador	Nicaragua	Uruguay	Venezuela

A candidate must be prepared, if required, to submit documentary evidence of fulfilling the foregoing requirement.

These awards are open to all such composers who agree to the terms and conditions as set forth on page three hereof and who submit their work in the manner therein described.

NATURE AND LENGTH OF WORKS: The awards are offered for compositions written for full symphony orchestra, the duration of which work will be not less than 20 minutes nor more than 35 minutes. (Five minutes leeway, however, will be permitted if the quality of the work, in the opinion of the judges, merits it.) The theme of such compositions is left entirely to the composer.

JUDGING: Compositions must first be submitted to a National Preliminary Award Jury in each individual country participating; members and headquarters of these juries will be announced publicly in the near future. These juries, composed of musical authorities in the various countries, will be approved by the Reichhold Music Award Committee. Decision of each National Preliminary Award Jury shall be final and can not be contested except by the International Award Jury.

The one symphonic work chosen by each Preliminary Award Jury to represent that country will be awarded a Certificate of Merit and entered in the final international judging for the prizes and honorable mention awards. Members of this final board will be selected by the Reichhold Music Award Committee from prominent music authorities whose names will be publicly announced. Karl Krueger, music director of the Detroit Symphony Orchestra, will, however, be chairman.

In both the National and International judging, preliminary selection from entries may be made by a committee appointed by the judges for the purpose of evaluating the compositions. Decisions of the International Award Jury shall be final and can not be contested.

No member of any of the aforesaid juries shall be eligible to enter the contest.

CLOSING DATE FOR ENTRIES: All entries must be in the hands of the National Preliminary Award Jury of each country by September 1, 1945. Addresses of these juries will be publicly announced in the local press.

ANNOUNCEMENT OF THE WINNERS: Announcement of the winners of the national awards will be made November 1, 1945, or as soon thereafter as the judges reach a decision. Awards in the final contest will be announced March 1, 1946, or as soon thereafter as the judges reach a decision.

HONORABLE MENTION: In addition to the three awards, Honorable Mention may be awarded to any composition entered in the final judging, which in the opinion of the jury merits such recognition.

IMPORTANT: Only works submitted according to the terms and conditions set forth on page three hereof will be entered for the consideration of the juries. In order that all compositions may be considered on a uniform basis, it is necessary that each candidate obtain an Official Entry Blank (see page 4) and that this be properly completed and sealed in the Official Envelope provided for that purpose. Only compositions accompanied by this Official Envelope properly completed with enclosures, will be considered for the Reichhold Music Award, 1945.

Any composition received without the required Official Envelope will be returned to the composer together with an Official Entry Blank and Official Envelope in order that the composition may be resubmitted in the required manner. In such cases this procedure will be followed without divulging the composer's identity to the juries.

39-40

PLAINTIFF'S EXHIBIT No. 1

35

TERMS AND CONDITIONS

1. Candidates must have been born in the Western Hemisphere and must be a citizen of one of the following countries:

Argentina	Haiti
Bolivia	Honduras
Brazil	Mexico
Canada	Nicaragua
Chile	Panama
Colombia	Paraguay
Costa Rica	Peru
Cuba	Salvador
Dominican Republic	United States
Ecuador	(inc. Alaska, Puerto Rico & Virgin Islands)
Guatemala	Uruguay
	Venezuela

2. The awards are offered for compositions fully scored for a symphony orchestra.

3. Playing time of entire composition should be not less than 20 minutes nor more than 35 minutes. (Five minutes leeway, however, will be permitted if the quality of the work, in the opinion of the judges, merits it.)

4. Compositions must be legibly written in ink and parts must accompany each score.

5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

6. A candidate may submit only one work. Such work must be submitted with an Official Entry Blank, wrapped flat, postage prepaid.

7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award.

Inquiries as to terms and conditions should be addressed to the Reichhold Music Award Committee, Room 4315, 30 Rockefeller Plaza, New York 20, New York.

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Official Entry Blank

REICHHOLD MUSIC AWARD

SYMPHONY OF THE AMERICAS 1945

To the Reichhold Music Award Committee:

Date Jan 18, 1946

1. I, the undersigned (represented by the pseudonym or motto ....NOSTREBOR....), submit herewith a composition entitled ....TRILOGY.... for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

3. I warrant that I am the sole composer of this composition, that it is an original work, and that it has never been published or publicly performed, either in part or in full.

4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

7. In order to facilitate judging, I grant to the Reichhold Music Award Committee the right to make copies, by photostat or other means, of the composition submitted by me.

8. I understand that three awards will be made as follows:

First Award	$25,000
Second Award	$5,000
Third Award	$2,500

9. I understand that Honorable Mention may be awarded to any composition not receiving one of the above awards.

10. I understand that a Certificate of Merit will be awarded to the composer of the winning composition in each participating country and that these winning works will then be forwarded for final judging in New York City.

11. I understand that you intend to return the composition to me after the announcement of the awards and to use due care in protecting it while it is in your custody but I hereby release you from any and all claims and demands arising out of the loss or destruction of said composition, however caused.

12. I hereby agree to indemnify and save harmless Henry H. Reichhold, Karl Krueger, the Detroit Orchestra, Inc., the radio network and stations over which such composition is broadcast, and the sponsor of such broadcast and its agency, the persons, firm or corporation making or selling any recording of such compositions, and each of them from any loss, liability, or expense resulting from any claim or litigation arising out of the recording, performing or broadcasting of such composition, provided, however, that I shall not be required to indemnify such orchestra, network or station for any loss, liability or expense resulting from any performance given without license from any performing right society of which I may be a member if such license shall be available to such orchestra, network or station, as the case may be.

13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs "4," "5" and "6" hereof.

14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs "4," "5" and "6," I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs "4," "5" and "6" and if I fail to furnish the same within 60 days, after notice to me, I shall be automatically eliminated from the contest.

15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, and I warrant that I was born in the country of ....USA.... and am a citizen of ....USA....

Name ....Leroy Robertson....

Address ....550 4th E.... (Post Office)

....Provo, Utah....

Signature ....Leroy Robertson....

Entries from the United States, Alaska, Puerto Rico and the Virgin Islands shall be sent to:
The Reichhold Music Award Committee, Room 4315, 30 Rockefeller Plaza, New York 20, New York.

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PLAINTIFF'S EXHIBIT No. 2

37

Amendments

TO THE

REICHHOLD MUSIC AWARD CONTEST RULES

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Due to various war time restrictions, censorship regulations and delays, and to many requests from numerous countries concerned, the Reichhold Music Award Committee has decided to amend the Official Rules and Entry Blank of the Symphony of the Americas Contest in the following particulars only:

PAGE 2, under NATURE AND LENGTH OF WORKS; *the last sentence should read:* "The form of such compositions is left entirely to the discretion of the composer except that they must be works for orchestra alone, and may not be concertos for solo instruments or choral works. It is suggested that composers include metronome markings."

PAGE 2, under JUDGING; *delete:* "and cannot be contested except by the International Award Jury."

change: "The one symphonic work . . ." to "The three symphonic works . . ."

Delete the sentence: "In both National and International judging, preliminary selection from entries may be made by a committee appointed by the judges for the purpose of evaluating the compositions."

PAGE 2, under CLOSING DATE FOR ENTRIES; and on Page 3, paragraph 7, *change:* "September 1, 1945" to "March 1, 1946".

PAGE 2, under ANNOUNCEMENT OF THE WINNERS; *change:* "November 1, 1945" to "June 1, 1946" and "March 1, 1946" to "September 1, 1946".

PAGE 3, Paragraph 4, *delete:* "and parts must accompany each score".

PAGE 3, Paragraphs 10 and 12; and Page 4, Paragraph 6, *delete:* "Honorable Mention or a Certificate of Merit".

PAGE 3, Paragraph 11; and Page 4, Paragraph 5, *add the sentence:* "Performance fees will be agreed upon between the Detroit Orchestra, Inc. and the composer"

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45=46

[fols. 47-48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] Argument and Submission—June 4, 1951 (omitted in printing)

IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION—July 10, 1951

Ellis N. Slack (Theron Lamar Caudle, Assistant Attorney General; Harry Baum, Special Assistant to the Attorney General; Scott M. Matheson, United States Attorney; and Bryant H. Croft, Assistant United States Attorney, were with him on the brief) for Appellant. S. E. Blackham (Sandgren and Blackham, on the brief) for Appellee.

Before Bratton, Murrah, and Pickett, Circuit Judges

PICKETT, Circuit Judge:

This appeal is taken from a judgment of the United States District Court for the District of Utah, which held that a sum of $25,000 received by the appellee, Leroy J. Robertson, herein referred to as the taxpayer, as a prize in a contest was not taxable income.

The facts necessary to a decision are not in dispute. In 1945, Henry H. Reichhold, an industrialist and philanthropist, as President of the Detroit Orchestra, Inc., offered three awards: $25,000, $5,000 and $2,500, respectively, for the best symphonic compositions written by native-born composers of North, Central and South America. As an- [fol. 50] nounced in the terms and conditions of the contest, the underlying purpose was to further a spirit of understanding among the Pan-American nations and to bring to the public the best new music written in the Americas.[1]

[1] The announced purpose was:

"The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of search-

There were also certain published conditions which each contestant was required to agree to upon entering the contest.[2]

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ing out the most meritorious new work for full symphony orchestra by a native composer of the Americas.

"It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan-American Countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prize. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

"The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas."

[2] These terms and conditions were in part:

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above-named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award."

During the years 1937, 1938 and 1939, the taxpayer, a musician and composer by profession, had composed a symphony called "Trilogy" which was unpublished and placed in his files. This composition was the result of a personal desire to compose a symphony and at the time was not done for the purpose of sale or profit. Upon learning from press releases of the attractive and extraordinary awards offered, the taxpayer took "Trilogy" from his files and entered it in [fol. 51] the contest. On December 14, 1947, he was awarded and received the $25,000 prize. In his income tax return for that year the taxpayer included this $25,000 in his gross income. He claimed the benefits of Sec. 107 (b) of the Internal Revenue Code[3] and in so doing computed the tax as though the $25,000 had been received ratably during the years 1937, 1938 and 1939. Later he filed a claim for refund of the tax paid as a result of the award money on the ground that it constituted a gift and was not taxable.

The Commissioner assessed a deficiency on the theory that

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[3] 26 U. S. C. A. 107 (b). "For the purposes of this subsection, the term 'artistic work or invention,' in the case of an individual, means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months."

the amount received represented taxable income and that the tax liability should have been computed under Sec. 107 (b) as though the $25,000 had been ratably received over the three year period, 1945, 1946 and 1947. The deficiency as established was paid and suit was brought for the refund. The District Court concluded that the cash prize was a gift as defined by 26 U. S. C. A. 22 (b), (3), and should not be included as gross income under Section 22 (a) of the Internal Revenue Code.[4]

[fol. 52] Sec. 22 (a) broadly defines gross income and by its sweeping terms it is evident that Congress intended that income should be taxed comprehensively and in so doing intended to exercise to the "full measure" its constitutional power. Helvering v. Stuart, 317 U. S. 154, 169; Helvering v. Clifford, 309 U. S. 331, 334; Douglas v. Willcuts, 296 U. S. 1, 9; Irwin v. Gavit, 268 U. S. 161, 166. Under this Section all income is taxable unless specifically excluded by other provisions of the statute. Sec. 22 (b), (3), excludes gifts from the income tax provisions but in view of the general purpose to tax, all income, specific exemptions should be strictly

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[4] 26 U. S. C. A. 22:

"(a) General Definitions.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(3) Gifts, bequests, devises and inheritances.—The value of property acquired by gift, bequest, devise, or inheritance. * * *"

construed. Commissioner v. Jacobson, 336 U. S. 28, 48; Helvering v. American Dental Co., 318 U. S. 322, 329.

The practical test which the courts have applied in cases where income has been claimed to have been a gift is to determine if the income was received gratuitously and in exchange for nothing. Helvering v. American Dental Co., supra, at page 330; Old Colony Tr. Co. v. Commissioner, 279 U. S. 716, 730; Bausch's Estate v. Commissioner, 2 Cir., 186 F. 2d 313, 314; Thomas v. Commissioner, 5 Cir., 135 F. 2d 378, 379; Sportwear Hosiery Mills v. Commissioner, 3 Cir., 129 F. 2d 376, 382; Willkie v. Commissioner, 6 Cir., 127 F. 2d 953, 955, certiorari denied 317 U. S. 659. The trial court reasoned that the income was a gift because the composition was not written for the purpose of entering it in the contest and not for the purpose of receiving the prize but for the satisfaction he would derive as an artist, that the donor furnishing the prize money derived no financial benefit from the contest, and that the Detroit Orchestra, Inc., which received rights in connection with the composition did not receive the same in exchange for the prize. We think that the court's conclusion was erroneous. It may be that when the taxpayer composed the symphony [fol. 53] his only purpose was to satisfy, as he described it, an "urge" which came upon him, and did not have in mind receiving income from it. The composition was, however, the result of his professional skill and training as a musician, and later when he read in the press of the "extraordinary awards" which were to be given to winners in this contest, it is incorrect to say that he was not offering the results of his professional skill to win prize money or that he would not accept it if his entry was declared the winner. For this purpose he selected "Trilogy" from his files and entered it in the contest. In addition to this he gave to the Detroit Orchestra, Inc., rights which are described in the entry terms. (See note 2, supra.) The fact that these rights had not previously been of value is immaterial. Although we think it was, we do not base our decision upon the narrow ground that the relinquishment of these rights was a consideration sufficient to determine the issue. We are of the opinion that when a person, such as here, submits the result of his skill and training in a contest and receives a prize, the

necessary elements of a gift as contemplated by the statute are not present. It cannot be said that the prize was entirely gratuitous or received in exchange for nothing. In this case the prize was won as a result of over three years professional effort of the taxpayer. The fact that the award may come from a tax exempt organization or from a nontaxable fund is generally immaterial. The taxability of the prize or award is to be determined in accordance with the law applicable to the person receiving it. Reichhold may not have received anything tangible for giving the award but the recipient received the prize as a result of his labors just as much as though he had sold it or had been paid for its use. The award may have been made for the purpose of giving assistance to or for the promotion of a nonprofit organization or for some educational or charitable purpose, nevertheless it is income to the individual who receives it by winning a contest by or for such organization.

The trial court relied upon the case of McDermott v. Commissioner, CADC, 150 F. 2d 585, as does the taxpayer here, but we think the majority of the court in that case placed [fol. 54] too much importance on the donative intent of the nonprofit association and on the nonpecuniary motive of the taxpayer. In a proper case there may be elements to be considered in determining if the receipt of a thing of value is a gift for tax purposes, but they are not necessarily controlling factors. We do not believe that the dominant motive of a contestant for a prize such as was given in a case like this is not a hope of immediate financial gain and that he himself is not exchanging services or its product for money. Nor do we believe that we can say that one entering this sort of a contest does it purely for the advancement of art or scholarly pursuits, if so, the contestant could well refuse to accept the prize. We hold that when a person enters a contest, such as in this case, which offers a valuable award and the contestant wins and accepts that award, its value is taxable to him. Stein v. Commissioner, 14 T. C. 494.

The Commissioner in his deficiency notice determined that the income should be taxed in accordance with 26 U. S. C. A. 107 (b), ratably over the years 1946, 1947 and 1948. The taxpayer contends that under the terms of the statute

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with instructions to enter judgment for the United States of America.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

On August 15, 1951, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. —

LEROY J. ROBERTSON, Petitioner,

vs.

THE UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 12, 1951

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 1st, 1951.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 388

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 11, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9634)

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit

---

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. ____

LEROY J. ROBERTSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Leroy J. Robertson prays that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals, Tenth Circuit, reversing the judgment of the United States District Court for the District of Utah, with instructions to enter judgment for the United States of America (R. 55).

OPINIONS BELOW

The oral opinion of the District Court, (R. 31) is not reported. The opinion of the Circuit Court of appeals (R. 49) is not reported.

JURISDICTION

The judgment of the Circuit Court of appeals was entered on July 10, 1951 (R. 55). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an award of $25,000 received by the taxpayer as the winner of the Reichhold Music Award, a Pan-American symphony composition contest, was includible in his gross income as defined in Section 22(a) of the Internal Revenue Code, or constituted a gift excludible from his gross income under Section 22 (b) (3).

2. Whether in computing the tax under Section 107 (b) of the Internal Revenue Code, the income should be apportioned over the years 1937, 1938 and 1939, the 36-months period in which the work on the symphony was performed by the taxpayer, or over the 36-months period covering the taxable year 1947, when the award was received, and the two years immediately preceding the taxable year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the appendix, *infra*, pp.

STATEMENT

The taxpayer is a musician and composer by profession. During the taxable year 1947, and for many years prior thereto, he was Professor of Music at Brigham Young University, and later was similarly employed at the University of Utah. In 1936, he commenced work on a symphony named

"Trilogy," and completed the work in 1939. Upon its completion the work was placed in taxpayer's files along with other completed musical compositions (R. 9).

In the year 1945, Henry H. Reichhold, a philanthropist, who was also president of the Detroit Symphony Orchestra, announced the "Reichhold Music Award" contest whereby he offered three awards of $25,000, $5,000 and $2,500, respectively, for the best symphonic works written by native born composers of North, Central and South America (R. 10). The broad purpose underlying the contest was as follows:

> "The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.
>
> "It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.
>
> "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 37).

Winners of the awards were to be selected from among composers who submitted entries in accordance with published terms and conditions of the contest (R. 10, 39-45). These terms and conditions included the following (R. 41):

> "5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

"6. A candidate may submit only one work. Such work must be submitted with an official Entry Blank, wrapped flat, postage prepaid.

"7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

"8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

"9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work re-

ceiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award.

After announcement of the contest the taxpayer was urged to enter his composition "Trilogy" but he did not do so as the original announcement required that "parts must accompany each score" (Par. 4, R. 41). Taxpayer had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts (R. 10, 23). However, when the "Amendments to the Reichhold Music Award Contest Rules" (R. 45), deleted the requirement that parts must accompany the score, taxpayer decided to enter his composition and did so on or about February 18, 1946, by filing an official entry blank (R. 10-11, 43). The entry blank recited (R. 43):

"1. I, the undersigned (represented by the pseudonym or motto * * * NOSTREBOR. * * *), submit herewith a composition entitled: * * * TRILOGY * * * for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

"2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

"3. I warrant that I am the sole composer of this composition; that it is an original work; and that it has never been published or publicly performed, either in part or in full.

"4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a

Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

"6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

* * * * *

"13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs '4', '5' and '6' hereof.

"14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs '4', '5' and '6', I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs '4', '5' and '6' and if I fail to furnish the same within 60 days, after notice to me, I shall automatically be eliminated from the contest.

"15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, * * *"

The composition entered by taxpayer was selected by the award committee as the best one submitted and taxpayer received the $25,000 cash award on December 14, 1947 (R. 11).

In his 1947 income tax return, taxpayer included the $25,000 prize in his gross income and claimed the benefits of Section 107 (b) of the Internal Revenue Code, computing the tax as though the $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. This resulted in a tax of $1,121.56 which was

duly paid by the taxpayer (R. 11). Attached to the return was a statement claiming that no part of the award was taxable income and that the taxpayer intended to file claim for refund of the tax paid (R. 2, 9). Thereafter, taxpayer on February 16, 1948, duly filed a claim for refund for the tax paid (R. 3-4).

Six months having elapsed since the filing of the claim for refund (R. 4), the taxpayer filed suit on January 24, 1949, for the recovery of the tax (R. 15). Thereafter, on or about October 24, 1949, the Commissioner assessed a deficiency of tax in the amount of $4,605.55, plus accrued interest of $444.34; or a total sum of $5,049.89. This sum was paid to the Collector November 7, 1949. The Commissioner assessed the deficiency on the ground that the tax should have been computed under Section 107 (b) as though the $25,000 had been received ratably over the 3-year period ending with the taxable year 1947 rather than over the 36 months ending December 31, 1939, during which the work was done (R. 4, 9, 12). Taxpayer filed an amended and supplemental claim for refund on November 22, 1949 (R. 4), and on June 12, 1950, filed his amended complaint (R. 1-7).

The District Court found as a fact that the taxpayer,

> "did not produce the composition 'Trilogy' for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to 'give'—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures, etc., the right to first performance and the right to designate the publisher of the composition" (R. 11).

and concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer for the full amount of the tax paid for the year involved (R. 12).

The Circuit Court of Appeals reversed the judgment of the District Court, not only on the main issue upon which that court's decision rested, but also on the secondary issue that was not decided by that court in view of its decision on the main issue, and remanded the case to the District Court with instructions to enter judgment for the United States (R. 55).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals, Tenth Circuit erred:

(1) In holding that the cash award received by the taxpayer as the winner of the Reichhold Music Award was includible in his gross income.

(2) In holding that the amount received as the award in 1947 should be apportioned over the three years just preceding the taxable year, the taxable year being included, rather than over the thirty-six months period in which the work on the symphony was performed by the taxpayer.

(3) In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

Two issues were presented to the District Court on the pleadings. The first issue presented the question whether the award received by the taxpayer was a gift or income. The second issue, pertinent only in the event the court held the award to be income and not a gift, involved the question as to the proper period to which the income should be allocated. The District Court did not consider the second issue and made no decision thereon. The Circuit Court of Appeals, however, as is indicated above, decided both issues against the taxpayer and remanded the case to the District Court with instructions to enter judgment for the United States.

On the main issue as to whether the award was a gift, the decision of the Circuit Court of Appeals, is in direct conflict with the decision of the United States Court of Appeals, District of Columbia in *McDermott* v. *Commissioner*, 150 F. 2d 585 and also with the decision of the United States District Court, District of Maryland in *Arsham Amirikian* v. *United States*, decided March 29, 1951, not yet reported but found in paragraph 72, 528 Prentice-Hall 1951. Cf. *Schall* v. *Commissioner*, 174 F. 2d 893 (C. C. A. 5th).

It being a fact question as to whether the award received by the taxpayer was a gift, and the District Court having found the fact of gift (R. 11, 32-33), the United States Court of Appeals, Tenth Circuit, exercised its appellate function contrary to the principles decided by the Supreme Court in *Bogardus* v. *Commissioner*, 302 U. S. 34 and *Commissioner* v. *Jacobson*, 336 U. S. 28. Cf. *Kerr* v. *United States*, 131 F. 2d 450 (CCA 7th).

The decision of the United States Court of Appeals, Tenth Circuit on the question as to the proper allocation of the award is squarely in conflict with the decision of the Court of Claims in *Williams* v. *United States*, 84 Fed. Supp. 362 and contrary to the word as well as the spirit of Section 107 (b), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 107 (b)) and Treasury Regulations 111, Sec. 29.107-2.

The questions involved herein are important questions of federal law which have not been, but should be settled by this Court.

CONCLUSION

For the reasons set forth above this petition for writ of certiorari should be granted.

Respectfully submitted,

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner,
48 No. University Avenue,
Provo, Utah.

APPENDIX

Internal Revenue Code:

"SEC. 22. GROSS INCOME.

"(a) *General Definition.* — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

"'(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Gifts, bequests, devises and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *'

* * * * *

"(26 U. S. C. 1946 ed., Sec. 22.)

"SEC. 107 [As added by Section 220(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139(a) of the Revenue Act of 1942, *supra*, and Section 119(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

* * * * *

"(b) *Patent, Copyright, Etc.*—For the purposes of this subsection, the term 'artistic work or inven-

tion', in the case of an individual means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.

* * * * *

"(26 U. S. C. 1946 ed., Sec. 107.)"

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.22(a)-1. *What Included in Gross Income.*—Gross Income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

"Sec. 29.22(a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons

in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. * * *

* * * * *

"Sec. 29.107-2. [As amended by T. D. 5458, 1945 Cum. Bull. 45.] *Artistic Work or Invention.*—Section 107(b) provides that if, in the taxable year, the gross income of an individual from an artistic work or invention of such individual covering a period of 36 calendar months or more (from the beginning to the completion thereof) is not less than 80 per cent of the sum of (1) the gross income therefrom in the taxable year, and (2) the gross income therefrom in previous taxable years and in the 12 months following the close of the taxable year, then the tax attributable to such gross income in the taxable year shall not be greater than the aggregate of the taxes attributable thereto had it been received ratably over (1) the part of the period of the work which precedes the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter. * * *

* * * * *

"The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

"'*Example (1).* On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, received $36,000 in full payment

for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated in 1940, $12,000 in 1941, and $12,000 in 1942 (the current taxable year).'"

* * * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On writ of certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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---

BRIEF FOR PETITIONER

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Utah, (R. 29-31) is not reported. The opinion of the United States Court of Appeals, Tenth Circuit, (R. 39-45) is reported in 190 F. (2d) 680.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 10, 1951 (R. 45-46).

Order extending time to file petition for writ of certiorari to and including November 1st, 1951, was entered September 12, 1951 (R. 46).

Petition for writ of certiorari was filed October 19, 1951 and was granted December 11, 1951 (R. 47).

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an award of $25,000 received by the taxpayer as the winner of the Reichhold Music Award, a Pan-American symphony composition contest, was includible in his gross income as defined in Section 22 (a) of the Internal Revenue Code, or constituted a gift excludible from his gross income under Section 22 (b) (3).

2. Whether in computing the tax under Section 107 (b) of the Internal Revenue Code, the income should be apportioned over the years 1937, 1938 and 1939, the last 36 months of the period in which the work on the symphony was performed by the taxpayer, or over the 36-months period covering the taxable year 1947 (when the award was received) and the two years immediately preceding the taxable year.

STATUTES, REGULATIONS AND RULE INVOLVED

The statutes, regulations and rule involved will be found in the appendix, infra, pp.

STATEMENT

The taxpayer is a musician and composer by profession. During the taxable year 1947, and for many years prior thereto, he was Professor of Music at Brigham Young Uni-

versity, and later was similarly employed at the University of Utah. In 1936, he commenced work on a symphony named "Trilogy," and completed the work in 1939. Upon its completion the work was placed in taxpayer's files along with other completed musical compositions (R. 8-9).

In the year 1945, Henry H. Reichhold, a philanthropist, who was also president of the Detroit Symphony Orchestra, announced the "Reichhold Music Award" contest whereby he offered three awards of $25,000, $5,000 and $2,500, respectively, for the best symphonic works written by native born composers of North, Central and South America (R. 9). The broad purpose underlying the contest was as follows:

> "The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.
>
> "It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.
>
> "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 9).

Winners of the awards were to be selected from among composers who submitted entries in accordance with published terms and conditions of the contest (R. 9, 34-37). These terms and conditions included the following (R. 35):

"5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

"6. A candidate may submit only one work. Such work must be submitted with an official Entry Blank, wrapped flat, postage prepaid.

"7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

"8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

"9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above-named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of com-

positions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award."

After announcement of the contest the taxpayer was urged to enter his composition "Trilogy" but he did not do so as the original announcement required that "parts must accompany each score" (Par. 4, R. 35). Taxpayer had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts (R. 9, 21). However, when the "Amendments to the Reichhold Music Award Contest Rules" (R. 37), deleted the requirement that parts must accompany the score, taxpayer decided to enter his composition and did so on or about February 18, 1946, by filing an official entry blank (R. 9-10, 36). The entry blank recited (R. 36):

"1. I, the undersigned (represented by the pseudonym or motto * * * NOSTREBOR * * *), submit herewith a composition entitled: * * * TRILOGY * * * for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

"2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

"3. I warrant that I am the sole composer of this composition; that it is an original work; and that it has never been published or publicly performed, either in part or in full.

"4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit

Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

"6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

* * * * * *

"13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs '4', '5' and '6' hereof.

"14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs '4', '5' and '6', I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs '4', '5' and '6' and if I fail to furnish the same within 60 days, after notice to me, I shall automatically be eliminated from the contest.

"15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, * * *."

The composition entered by taxpayer was selected by the award committee as the best one submitted and taxpayer received the $25,000 cash award on December 14, 1947 (R. 10).

In his 1947 income tax return, taxpayer included the $25,000 prize in his gross income and claimed the benefits of Section 107 (b) of the Internal Revenue Code, computing the tax as though the $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. This resulted in a tax of $1,121.56 which was duly paid by the taxpayer (R. 10). Attached to the return was a statement claiming that no part of the award was taxable income and that the taxpayer intended to file claim for refund of the tax paid (R. 2, 8). Thereafter, taxpayer on February 16, 1948, duly filed a claim for refund for the tax paid (R. 2-4).

Six months having elapsed since the filing of the claim for refund (R. 4), the taxpayer filed suit on January 24, 1949, for the recovery of the tax (R. 14). Thereafter, on or about October 24, 1949, the Commissioner assessed a deficiency of tax in the amount of $4,605.55, plus accrued interest of $444.34, or a total sum of $5,049.89. This sum was paid to the Collector November 7, 1949. The Commissioner assessed the deficiency on the ground that the tax should have been computed under Section 107 (b) as though the $25,000 had been received ratably over the 3-year period ending with the taxable year 1947 rather than over the 36 months ending December 31, 1939, during which the work was done (R. 4, 8, 10). Taxpayer filed an amended and supplemental claim for refund on November 22, 1949 (R. 4), and on June 12, 1950, filed his amended complaint (R. 1-6).

The District Court found as a fact that the taxpayer,

> "did not produce the composition 'Trilogy' for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to 'give'—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The

composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra, synchronization rights as applied to motion pictures, etc., the right to first performance and the right to designate the publisher of the composition" (R. 10).

and concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer for the full amount of the tax paid for the year involved (R. 11).

The Circuit Court of Appeals reversed the judgment of the District Court, not only on the main issue upon which that court's decision rested, but also on the secondary issue that was not decided by that court in view of its decision on the main issue, and remanded the case to the District Court with instructions to enter judgment for the United States (R. 45-46).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals, Tenth Circuit erred:

(1) In holding that the cash award received by the taxpayer as the winner of the Reichhold Music Award was includible in his gross income.

(2) In holding that the amount received as the award in 1947 should be apportioned over the three years just preceding the taxable year, the taxable year being included, rather than over the thirty-six months period in which the work on the symphony was performed by the taxpayer.

(3) In reversing the decision of the District Court.

ARGUMENT

I.

THE CASH AWARD RECEIVED BY THE TAXPAYER IN THE YEAR 1947 WAS A GIFT TO HIM AND WAS NOT PROPERLY INCLUDIBLE IN HIS TAXABLE INCOME FOR THAT YEAR.

Section 22 (a) of the Internal Revenue Code provides that "gross income," among other things, includes "compensation for personal service, of whatever kind and in whatever form paid." Subdivision (b) (3), immediately following, provides that "the value of property acquired by gift, bequest, devise, or inheritance" shall not be included in gross income and shall be exempt from taxation under the statute.

The District Court, upon the stipulation of the parties supplemented by the testimony[1] of the taxpayer, found as a fact on the one hand that the taxpayer did not produce the composition "Trilogy" for the purpose of entering it in any contest, of selling it to Mr. Reichhold or any other person or to produce income; that it was the product of the inspiration of an artist, his desire to do creative work, and was motivated dominantly and primarily for reasons other than monetary. On the other hand, the court found that Mr. Reichhold's purpose and intent in announcing the contest and making the awards was to "give"—not to buy or sell—and the award made to the taxpayer was not in exchange for the right to capitalize on the composition (R. 10). From these findings of fact, the court concluded that the award constituted a gift, not includible in taxpayer's income and granted judgment in favor of the taxpayer. The Circuit Court reversed on this issue as well as on a secondary issue not before the lower court and remanded the case to the lower court for the entry of judgment for the United States (R. 45-46).

The oral opinion of the District Court shows that the evidence and facts were very carefully considered and weighed by the court, and that from such consideration he believed

[1] No evidence was submitted by the Government (R. 29).

that "it is the kind of thing—difficult as it is to draw the line—that falls on the side of giving rather than of selling or buying of either services or compensation" (R. 31).

This Court, as well as others, has held that "intention must govern" in determining whether or not a gift has been made. *Bogardus* v. *Commissioner*, 302 U. S. 34; *Commissioner* v. *Jacobson*, 336 U. S. 28; *Poorman* v. *Commissioner*, 131 F. 2d 946 (C. A. 9th). Whether a gift is effectuated depends upon the real intent of the parties and is primarily a question of fact to be resolved upon the particular circumstances of each case. *Smith* v. *Manning*, 189 F. 2d 345, (C. A. 3rd); *Thomas* v. *Commissioner*, 135 F. 2d 378 (C. A. 5th); *Willkie* v. *Commissioner*, 127 F. 2d 953 (C. A. 6th); *Fisher* v. *Commissioner*, 59 F. 2d 192 (C. A. 2nd); *Schall* v. *Commissioner*, 174 F. 2d 893 (C. A. 5th).

Is the finding of the District Court that in making the award Mr. Reichhold's purpose was to "give"—not to employ or to buy or sell—supported by substantial evidence? We think it is and consequently "must govern" the decision in this case.

In the first place the announcement of the contest stated that "The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 33). This shows that the purpose or intent underlying the contest and the making of the award by Mr. Reichhold was inspired from "general motives of philanthropy." *Schall* v. *Commissioner*, supra. Certainly the public was the beneficiary of that philanthropy, as was the Detroit Orchestra, but to say, as the Government contended below, that the taxpayer was not also the beneficiary of that bounty, is to close one's eyes to reality.

We submit that in no sense was this *quid pro quo;* that the taxpayer rendered no services to Mr. Reichhold for which he received compensation as such. True, he received a gain but in the same sense that any beneficiary of a gift, devise or bequest receives a gain which is not taxable.

While the Detroit Orchestra received some benefits from the contest in that it was given synchronization rights as applied to motion pictures, etc., the right to first performance and to designate the publisher of the composition, the record clearly shows that these rights have produced no income or anything of value (R. 25), except possibly whatever value the Detroit Orchestra may have realized by the first performance, and on this phase the record is silent, as it is on any question of value.[2]

On June 18, 1945, the Court of Appeals for the District of Columbia decided the case of *McDermott* v. *Commissioner*, 150 F. 2d 585. That case reversed the Tax Court on the very issue involved herein. Notwithstanding this reversal, however, in the later cases of *Stein* v. *Commissioner*, 14 T. C. 494, and *Waugh* v. *Commissioner*, decided April 5, 1950 (1950 P-H T. C. Memorandum Decisions, Par. 50,095) the Tax Court has expressed an inability to follow the *McDermott* case in all respects. These cases, however, are not repugnant to the *McDermott* case but were in fact distinguished therefrom (as we shall show later) by the court itself and are, we think, entirely reconcilable and consistent with taxpayer's position herein. On March 29, 1951, the United States District Court, District of Maryland, in *Arsham Amirikian* v. *United States*, not reported but found in 1950 P-H par. 72,528, a case quite similar to the instant case, in an exhaustive and well-reasoned opinion followed the *McDermott* case and the decision of the District Court in the instant case, distinguishing these cases on the facts from both the *Stein* case and the *Waugh* case. While the Bureau has announced its intention not to follow the *McDermott* case (I. T. 3960,

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[2]It has been noted that the Government submitted no evidence in this case. Apparently the only issue on which the Government was concerned before the District Court was as to the period involved in composing the symphony. That was the primary point upon which the taxpayer was cross-examined and no effort was made by the Government to establish any value of the rights inuring to the Orchestra (R. 25-29). We believe that the logical inference from the facts established is that these rights were of no substantial value. In any event the record will not substantiate the fact that the $25,000 was paid to the taxpayer by Mr. Reichhold in exchange for these rights, as the Government contended, for the first time, in the Circuit Court.

1949-2 Cum. Bull. 13), this announcement did not come until after the original complaint was filed in the instant case and was no doubt inspired by that complaint. At the time of the filing of the complaint in this case, therefore, neither the *Stein* nor *Waugh* cases had been decided nor had I. T. 3960 been issued, and the *McDermott* case remained the unchallenged authority on the subject.

The *McDermott* case involved the question whether the Ross Essay Prize of $3,000 awarded by the American Bar Association for 1939 constituted payment for services rendered so as to be taxable to recipient as income or was a "gift" excludible from gross income under Section 22 (a) and (b) of the Internal Revenue Code—the precise question involved herein. From the opinion written by Judge Edgerton, which we think is particularly applicable to and dispositive of the issue herein, we quote at length as follows (pp. 587-588):

> "Petitioner's tax liability, if any, depends directly upon whether the award was part of his 'gross income' within the meaning of Section 22 (a) of the Internal Revenue Code in force in 1939, which included 'gains, profits, and income * * * from professions * * * or * * * from any source whatever', or whether on the other hand the award was a 'gift' within the meaning of Section 22 (b) (3). If the American Bar Association in carrying out the wishes of Judge Ross paid petitioner $3,000 for services, the amount was taxable to petitioner, but if it gave petitioner $3,000 the amount was not taxable. The Tax Court found, apparently on the basis of findings which we have discussed, that the award was not a gift from the trustee. We think this was erroneous.
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> "We think the following circumstances taken together require the conclusion that the award was a gift and not income within the meaning of the statute. (1) No one not talking law would be likely to say that the Association paid petitioner $3,000 for writing an essay which petitioner wrote. In plain English the Association gave petitioner the prize. The Rhode Island court used words in their ordinary sense when it said

of a trust to award prizes for 'the best works produced during the year' by Rhode Island artists: 'The purpose of the prizes is not simply to give a little money every year to the successful artists, but also to arouse the ambition of Rhode Island artists everywhere, and incite their best endeavors.' (2) The purpose of Judge Ross and the American Bar Association in creating and administering the Ross prize was likewise to 'give' and to 'incite,' not to employ or buy. (3) Money may be a gift in law as well as purpose although services are or have been rendered by the donee. (4) Whatever services petitioner rendered were not rendered to the trustee. The American Bar Association neither derived nor sought any profit from the contest or from petitioner's participation in it. On the contrary the entire undertaking was an expense to the trust; the entire advantage accrued to petitioner and the community. This among other things distinguishes the Ross prize from puzzles, guessing contests and publishers' contests operated for commercial purposes. Petitioner received 'financial advantage gratuitously.' (5) An important characteristic of gifts is that, unlike many sorts of 'income', they cannot be counted upon in advance and may never recur. The Ross prize has this characteristic. It is therefore within the policy which exempts gifts of principal from taxation as income. (6) It is safe to say that the dominant motive of a normal contestant for this prize is not a hope of immediate financial gain. He does not regard himself as exchanging his services or his product for money. To one whose life is devoted to scholarship and whose position is affected by his scholarly output, the publication of an outstanding essay is its own reward and may lead to other rewards both tangible and intangible. No doubt the contest provides an added motive which may direct and more or less increase a scholar's effort, but this added motive is more a matter of prestige than of money. (7) The Commissioner does not say that taxes have ever been collected on Nobel prizes, Guggenheim fellowships, Rhodes scholarships, Ross prizes, or any of the many scholarships

and prizes which, like these, have long been awarded on a competitive basis to scientists, scholars, or students. We think we may infer that the practice has been to the contrary. This long-continued administrative interpretation of the law is entitled to great weight. (8) Finally, requiring winners of scholarly awards to pay taxes on them would conflict with the wise and settled policy of encouraging scholarly work."

We submit that there is no more real reason to tax the award as income in this case than in the cases of "Nobel prizes, Guggenheim fellowships, Rhodes scholarships, Ross prizes, or any of the many scholarships and prizes which, like these, have long been awarded on a *competitive* basis to scientists, scholars, or students." Certainly they all stem from philanthropic desires and purposes, are awarded on a competitive basis and have no commercial aspects from which the source of the award hopes to, or does receive any financial remuneration such as the sponsors of our so-called give-away programs on present-day radio. In the latter situations the sponsors receive their *quid pro quo* in their expense deductions, increase in sales, etc. Indeed, we venture the guess that such programs would cease to exist if they were not returning value to the sponsors. There is in such cases no *donative intent* upon the part of the sponsor who provides the prize. In the other cases we have enumerated, in which the instant case logically falls, such awards continue to be made frequently, with no thought of financial gain to the giver, and with no other reward except the benefits derived by society at large and by the donee who is thus encouraged in his scholarly work and to further contributions to the welfare, knowledge and culture of mankind.

If we were able to explore the minds of the donors of the various prizes, fellowships and scholarships above mentioned (which are admittedly gifts and not taxed) and that of Mr. Reichhold, to determine their intentions with respect to the various awards, we would find, no doubt, the same motivations, intentions and philanthropic purposes in the minds of each of them. *And it is these motivations, intentions and philanthropic purposes that are determinative of the fact that a*

gift has been made—not whether the recipient was an active candidate for the gift or whether he was engaged in the pursuit of a trade or business.

In the Circuit Court the Government contended that because the taxpayer is a musician and composer by business and profession and used his professional skill to write the musical composition, the award was compensation to him from such business or profession. This is, of course, the very meat of the Government's case. If this contention were valid, then certainly Nobel prizes, Guggenheim fellowships, etc., would likewise fail as gifts because the winners who receive such awards are usually outstanding in some business or profession and win the awards largely as a result of their skill therein. On the other hand, would the Government concede a different result in the instant case if the taxpayer were not a musician or composer by profession but were, for instance, a lawyer possessed of musical talent, who had theretofore written a musical composition for no particular reason "other than it seemed like it had to be done," and had entered it in the contest? This contention must necessarily fail in any event in the light of the decided cases, for in the *Bogardus* case, supra, the recipients of the gifts would not have received them except for their employment, and in the *Schall* case, supra, the "honorarium" went to a former pastor of a church in "gratitude for his long and valued ministry" at his profession.

Thus, it would seem to be clear that no significance may be attached to the fact that the taxpayer herein was a musician and composer by profession. At any rate, it is not controlling. On the other hand the significant fact is the "intention of the parties, gathered from the facts and circumstances surrounding the transaction, *and particularly that of the payor* * * *." *Willkie* v. *Commissioner*, supra. Emphasis supplied.

In both *Stein* v. *Commissioner*, supra, and *Waugh* v. *Commissioner*, supra, the Tax Court evidences a disinclination to follow the *McDermott* case to its concluson, but a careful study of those cases will demonstrate that while the two courts achieved opposite results in the three cases there is in

fact no real conflict between the decisions and they may be easily reconciled (as the Tax Court did) on the findings of fact.

In the *Stein* case the contest was conducted by the Pabst Brewery in celebration of its one hundredth anniversary. A prize of $25,000 was paid by the company for the best plan of post war employment in the United States. The award was held to be taxable as income. The Tax Court distinguished the *McDermott* case on the ground that Pabst used the contest for publicity in its business and did not treat the awards as gifts, but deducted them as ordinary business deductions in its own tax accounting.[3] The Tax Court said pp. 500-501:

> "Some of the statements or thoughts appearing in the Court's opinion in McDermott v. Commmissioner, supra, do seem to give color and support to the theories advanced in the petitioner's behalf. With all due respect to the court in that case, we find ourselves unable to follow it to its conclusion that the scope and meaning of income as it appears in the Sixteenth Amendment and in the Congressional enactment is so restricted, but, even if we are wrong in presuming to conclude, the McDermott case is rather plainly distinguishable from the instant case when certain of the thoughts and pronouncements of the court there are applied to the facts here.
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> * * * * *
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> "As suggested above, however, it is our opinion that this case fails to come within the scope of the McDermott case as decided by the court in that there the court did find on the part of the furnisher of the funds a donation intent and from that concluded that the money as given and as received was a gift specifically excluded by Congress from gross income, while here no such intent is shown. In this case the record does no show specifically the characterization of the

[3] While this record is silent on the subject, it may be presumed that Mr. Reichhold claimed no deduction for income tax purposes in the amount of the awards. Otherwise the Government would undoubtedly have established the fact.

expenditures by Pabst on its books, but, however they were denominated, it is clear that Pabst did not regard them as gifts. Unlike the situation in Bogardus v. Commissioner, 302 U. S. 34, where the payor did not treat as expenses the payments held to have been gifts, but charged them directly to surplus, Pabst treated the amount of the awards, including the $25,000 paid for the war bonds awarded to petitioner, as an expense of conducting its business for its current taxable year. Such treatment certainly indicates that Pabst did not regard its award as the making of a gift."

The Tax Court also made the following statement:

"It is accordingly our view that in the McDermott case, as well as in the argument here, too much importance was placed on the question whether the original furnisher of the money intended to make a gift and too little attention was paid to the question whether there was as to the recipient gain or compensation from labor or work at a business or profession."

The Circuit Court below made a similar statement (R. 44) and seems to have largely premised its opinion thereon.

If, however, as held by this Court in the *Bogardus* case, supra, "intention must govern" it is difficult to understand how the Tax Court and the Circuit Court of Appeals could conclude that "too much importance was placed on the question whether the original furnisher of the money *intended* to make a gift", particularly when the Tax Court chose to distinguish the two cases on that very point.

The Tax Court further said:

"The entire undertaking seemingly was a part of Pabst's advertising program. Under such circumstances we could not reasonably conclude that Pabst launched the plan with an entirely educative intent or that the scheme was purely for the purpose of the educational development of the participants, particularly the winning entrants or solely for the public benefit."

In the instant case, however, the contest was not an advertising scheme or commercial in any sense and the District Court *has* reasonably concluded that Mr. Reichhold launched his plan with an entirely philanthropic intent purely in "furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in the Americas" (R. 33). Of great significance is the fact that the Government stipulated that these were the purposes (R. 22).

In the *Waugh* case the prize was awarded in a contest sponsored by The American Farm Economic Association for the best essay on farm price policies. Here again the Tax Court distinguished the *McDermott* case on the facts as follows:

> "Though the facts in the two cases are closely parallel in our view the cases are distinguishable in one important respect. In the McDermott case the Court found on the facts before it, that the purpose of the American Bar Association was donative, that the American Bar Association 'neither derived nor sought any profit from the contest or from petitioner's participation in it' and that 'the entire advantage accrued to petitioner and the community.' "

Likewise, in the instant case the District Court has found that Mr. Reichhold, who gave the award, neither derived nor sought any profit from the contest or from the taxpayer's participation in it and it is conclusively shown that the entire advantage accrued to the public, the petitioner and perhaps, in part, to the Detroit Orchestra.

We are not sure what significance this Court may attach to the fact that the composition in this case was finished years before the announcement of the Reichhold Music Award and other than the mere filing of the entry blank no further work was performed on the composition in contemplation of the contest or the eventual prize, but we think this fact is important and tends to emphasize the fact that no labor or service was performed by the taxpayer for Mr. Reichhold, for which the taxpayer received compensation. The Government

apparently thought this fact to be of prime importance at least in the *Amirikian* case, supra, for it drew from the Court in its decision in that case the following comment:

> "However, the Government now takes the position in the present suit that the Robertson case is distinguishable in that there the musical composition was finished some time before the announcement of the award contest *which was not commercial in any sense and, therefore, it could not be said that money was the motive which dominated the preparation of the composition, contrary to what the Government claims is true with respect to the present plaintiff.*" Emphasis supplied.

It is made clear by the majority as well as the dissenting opinion in the *Bogardus* case, supra, that, in determining whether the receipt of money is a gift or compensation "What controls is not the presence or absence of consideration. What controls is the intention with which payment, however voluntary, has been made."

We submit that not only is there substantial evidence in this case to sustain the finding of the District Court that Mr. Reichhold's intention was to "give"—not to buy or sell but that no other inference can fairly be drawn from a review of the evidence. The District Court's findings and decision should be sustained.

II.

THE FINDING OF THE DISTRICT COURT THAT MR. REICHHOLD'S PURPOSE IN ANNOUNCING THE CONTEST AND MAKING THE AWARD WAS TO "GIVE"—NOT TO EMPLOY OR TO BUY OR SELL—WAS NOT "CLEARLY ERRONEOUS" AND SHOULD BE SUSTAINED.

It is pointed out in the minority opinion of this Court in the *Bogardus* case, supra, that where on the evidence in a case there might be "opportunity for opposing inferences" the judgment of the fact finding tribunal controls. *Elmhurst*

Cemetery Co. v. *Commissioner*, 300 U. S. 37, 57; *Helvering* v. *Tex.-Penn. Oil Co.*, 300 U. S. 481.

This rule is in harmony with Rule 52 (a) of the Federal Rules of Civil Procedure, infra, which in so far as it is material to this case provides as follows:

> "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. *Findings of fact shall not be set aside unless clearly erroneous,* * * *." Emphasis supplied.

Applying the above quotation to the present case, although we feel that the conclusions reached by us in the preceding section of this brief (that there is substantial evidence to sustain the District Court's finding of an intention to "give" and that no other inference can fairly be drawn from the evidence) are entirely sound and amply supported by the decided cases and a fair interpretation of the law and regulations, if perchance this Court should determine that we have erred in those conclusions, we submit that there is at least some inference that in making the award Mr. Reichhold intended to "give"—not to buy or sell. If so, the finding to this effect by the District Court is not "clearly erroneous" but, under Rule 52 (a), is controlling of the issues herein and should be sustained, compelling the reversal of the decision of the Circuit Court of Appeals and the sustaining of the decision of the District Court. *Kerr* v. *United States*, 131 F. 2d 450 (C. A. 7th).

III.

IF THE AWARD IS TAXABLE AS INCOME, THE CIRCUIT COURT ERRED IN HOLDING THAT UNDER SECTION 107 (b), INTERNAL REVENUE CODE, IT SHOULD BE TAXED RATABLY OVER THE YEARS 1945, 1946 AND 1947[1] RATH-

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[1]These are the proper years and not the years 1946, 1947 and 1948 as erroneously stated in the Circuit Court's opinion (R. 44). The Circuit Court was also in error in stating the year 1938 as the year of the completion of the work (R. 45).

ER THAN AS THOUGH IT HAD BEEN RECEIVED RATABLY OVER THE YEARS 1937, 1938 AND 1939, THE LAST 36 MONTHS OF THE PERIOD IN WHICH THE SYMPHONY WAS BEING COMPOSED.

It is the taxpayer's contention that in applying the provisions of Section 107 (b) to this case, the amount received in 1947 should be taxed as though received ratably over the last 36 months of the period in which he was engaged in composing the symphony. This would prorate the entire sum back to the years 1937, 1938 and 1939 because the last 36 months of the work consumed all of these years. It is the Government's contention that the entire sum should be prorated to the calendar years 1945, 1946 and 1947 regardless of the fact that in those years only two things occurred that had any relationship whatsoever to the award—(1) the taxpayer submitted his entry in the contest in February, 1946, (R. 9-10, 36) and (2) he received the award in December, 1947 (R. 10).

The District Court's decision that the award received by the taxpayer was a gift, and consequently not taxable income, made it unnecessary for it to decide as to what years the sum received as the award should be prorated. It did not pass on that point.

The Circuit Court, however, apparently without considering or even citing the prior and well-reasoned decision of the Court of Claims in *Williams* v. *United States*, 84 Fed. Supp. 362, precisely in point, and since it was "necessary to return the case," felt that they "should express our views upon the meaning of this statute" [Sec. 107 (b)]. But instead of merely expressing its views on this point and remanding the case to the District Court for its determination, the Circuit Court reversed the cause with instructions to enter judgment for the United States.

It is the petitioner's contention that the Circuit Court erred in the first place in reversing the lower court on a point upon which the latter court had had no reason, or opportunity, to pass, *Hormel* v. *Helvering*, 312 U. S. 552, and that in the

second place, even though this point were properly before the Circuit Court, it erred, as did the Commissioner of Internal Revenue, in its application of the provisions of Section 107 (b).

While we do not intend to minimize its importance thereby, we shall nevertheless not labor this brief with further argument or citation of authorities on the first point, but proceed to a consideration of the proper application of the provisions of Section 107 (b) to the facts in this case.

The record establishes without question that the work on the composition was begun in the autumn of 1936 and was completed at the end of the year 1939 (R. 19-20).[5] Upon completion, the score was put aside and nothing further was ever done to it in the way of correcting or changing it from time to time thereafter (R. 20, 27).

When the contest was announced, the taxpayer was urged to enter his composition, but as the announcement required that "parts must accompany each score" (Par. 4, R. 35), he declined to enter, feeling that his eyes, which had been overworked during college days, would not stand the strain entailed in writing the parts (R. 9, 21). Upon later amendment of the rules governing the contest, eliminating the requirement of writing the parts, the taxpayer decided to enter his composition in the contest and did so on or about February 18, 1946, by filing an official entry blank (R. 9-10, 36).

The taxpayer's composition won the first prize, and he received the $25,000 cash award on December 14, 1947 (R. 10).

As indicated above, the precise issue involved under this subdivision of our brief has been decided by the Court of

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[5]In the Government's memorandum brief in response to our petition for certiorari, it is noted that the taxpayer testified that all steps necessary to earn the prize had not been taken in the three-year period to which he would attribute his earnings (Br. 3). We submit that this is of no significance, even though what was done may be considered as work, because the statute is not concerned with what the taxpayer may be required to do in acquiring the income but is concerned only with the period in which the taxpayer is engaged in performing the work on the composition that produces the income, provided that period is 36 months or more.

Claims in a sound and exhaustive opinion in *Williams* v. *United States*, supra, in which the legislative history of Section 107 was also considered at length.

In that case the taxpayer had worked on an invention from about 1925 until February 7, 1931, when he filed application for patent. The patent was not issued until August 24, 1937. On March 19, 1942, he was paid a sum in lieu of monies due under royalty agreement, which sum was more than 80 per cent of all income he had received from the patent at any time. The Commissioner of Internal Revenue, even though the payment involved was received on March 19, 1947, and no work on the patent was done thereafter, determined that the tax on the sum received should be computed as if that sum had been received ratably during the three calendar years ending December 31, 1942, and the Government so contended.

The court rejected the Government's contention and held that the taxpayer was entitled to compute his taxes as if the sum received on March 19, 1942, had been received ratably during the 36 months ended on February 7, 1931, saying in part (pp. 366-367):

> "Section 107 (a) concededly permits the taxpayer, if his work extended over a period of thirty-six months or more, to compute his taxes as if he had been paid monthly concurrently with his work, no matter when the work was done. If then, the plaintiff had been a lawyer who worked for more than three years and finished his work in 1931, but did not receive his fee until 1942, he could have computed his taxes at the rates in force in the years ending in 1931.
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> "The Government says that the plaintiff, whose income was from a patent, and therefore covered by Section 107 (b) cannot do as it admits that the lawyer could do, but must compute his tax as if the income received in 1942 had been earned in 1940, 1941, and 1942. In fact, it was not earned in those years. To attribute to Congress an intention to relate the income of e. g., a lawyer, to the time when he did the work for which he was ultimately paid, but, in the next subdi-

vision of the same section of the Code to relate the income of an inventor, not to the period when he did the work but to another period arbitrarily specified for the purpose, although nothing relevant occurred in two of the three years of that period, would be to attribute to Congress a lack of consistency.

"Section 107 (b) in its first sentence speaks of, inter alia, a patent 'the work on which by such individual covered a period of thirty-six calendar months.' In the second sentence it provides that the tax should not be more than it would have been if the income had 'been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.' The expression 'the period' in the second sentence refers, grammatically and logically, to the period referred to in the first sentence, which is the period when the work was done. The fact that the period referred to in the second sentence must precede the close of the taxable year suggests that it should immediately precede it, but the suggestion is not so strong as to enable the interpreter of the language to completely change the reference in the second sentence to 'the period' from its grammatical and logical meaning and make it refer to a wholly different period."

We submit that the decision of the Court of Claims applies the statute correctly and as pointed out the manifest purpose of both subsections (a) and (b) of Section 107 is to relate the income and the tax thereunder *"to the time when the work which produced the income was done, and not to some other arbitrarily fixed and otherwise irrelevant period."*

The Commissioner in the *Williams* case, as well as in the instant case, has interpreted the statute as requiring the taxpayer to compute his income from the indicated sources as though it had *been received ratably over the three calendar years immediately preceding the close of the taxable year.* We submit that the statute does not so provide nor does it do so if the words "36 months" were substituted for the words "three calendar years." Such interpretation completely

ignores the phrase "over that part of the period" appearing in the second sentence of the statute in question, which obviously, as pointed out in the *Williams* case, *"refers, grammatically and logically to the period referred to in the first sentence, which is the period when the work was done."*

It is significant here to note that in the Commissioner's regulations the sum received is attributable to "the part of the period *of the work* which precedes the close of the taxable year, * * *." *Treasury Regulations* 111, *Sec.* 29, 107-2, infra. Emphasis supplied.

We think of further significance in determining the period to which the income is allocable, is the fact that the statute specifies a period of thirty-six calendar months and not three calendar years and that subsection (c), of the same statute, infra, provides for fractional parts of a month for the purposes of the entire section—not to a particular subsection. The Commissioner's interpretation of subsection (b), we submit, would render subsection (c) useless and of no significance whatever to the former.

After a long and careful study and analysis of the statute under consideration, it seems to us that it is intended to, and clearly does provide, in the circumstances set forth, for the allocation of the income received to the period in which the work creating the composition was performed, not exceeding 36 months, regardless of whether that work was performed in the taxable year and the next two immediately preceding years or, as in this and the Williams case, several years and months before the receipt of the proceeds therefrom, or under any combination of months equaling thirty-six in which the work was performed.

Only by such construction can all taxpayers qualifying under Section 107 (b) receive the same treatment in the computation of their taxes at the rates in effect when the work creating the composition that produced the income was performed. We submit that this is the manifest purpose of the statute and the only reasonable interpretation of it. Otherwise, under the Government's construction only the person engaged continuously for three successive years or more, ending between the 15th and 31st days of December,

inclusive, in the taxable year, could allocate his income over the period to which the work was performed. All other persons would have at least some period to which their income would be arbitrarily allocated that would have no relationship whatever to the period in which the work was performed, and particularly is this apparent if "months" rather than "years" are considered. In fact, in the instant case the entire sum received by this taxpayer has been thus arbitrarily allocated by the Commissioner to a period having no relationship in the least to the period in which the work was performed.

We know of no decision, other than the decision of the Circuit Court in the instant case, where the method of allocating income as used by the Commissioner has been upheld. On the other hand, not only has the Court of Claims in the *Williams* case, supra, rejected this method and approved the method used by the taxpayer in the instant case, but the Tax Court of the United States in *Richardson* v. *Commissioner*, 14 T. C. 547 (A) I. R. B. 1950-20 and *Terrell* v. *Commissioner*, 14 T. C. 572 has by application approved the method of allocation as used by this taxpayer. In fact this method is not at odds, but entirely consistent, with the Commissioner's Regulations as shown by the examples therein.

In the *Richardson* case, involving net proceeds obtained from a book which the taxpayer commenced writing not later than November 1, 1941, and completed April 6, 1945, reference to the Rule 50 computation will show that that income, received in 1945, was allocated ratably under Section 107 (b) to three months in 1945, the years 1944 and 1943 and 9 months in 1942.

In the *Terrell* case, involving Section 107 (a), the taxpayer's compensation was for services extending over a period of 78 months from 1937 to June, 1944. Under the Rule 50 computation that income, which was received in 1944, was allocated ratably to six months in 1944 and to the years 1938 to 1943 inclusive.[6]

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[6]In the allocation of income under Section 107 (a) the taxpayer is not limited to a 36-month period.

The Government will no doubt urge, as it has done previously, that Section 107 (b) constitutes an exception to the general rules governing taxation of income and that a taxpayer claiming its benefits must bring himself within the letter of the Congressional grant. *Lindstrom* v. *Commissioner*, 149 F. 2d 344, 346 (C. A. 9th); *Smart* v. *Commissioner*, 152 F. 2d 333 (C. A. 2d), certiorari denied, 327 U. S. 804. We are, of course, well aware of that rule but believe that we have demonstrated that we come clearly, not only within the very letter of the statute, but its spirit as well, and that only by an indifference to the statute or a strained and stilted construction of it can the results reached by the Circuit Court be, in any sense, attained.

The work performed by the taxpayer in producing the musical composition Trilogy was performed during the latter part of 1936 and the years 1937, 1938 and 1939. He did no work on the composition thereafter. If Section 107 (b) has any purpose at all it is clearly to relate the proceeds received from the composition to the years in which the work producing it was performed, not exceeding 36 months. This would allocate the award to the 36 months comprising the years 1937, 1938 and 1939 as was properly done by the taxpayer.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

SAMUEL E. BLACKHAM,
CLYDE D. SANDGREN,
Attorneys for Petitioner.

48 North University
Avenue, Provo, Utah.

Of counsel
Sandgren and Blackham
Provo, Utah

APPENDIX

Internal Revenue Code:

"SEC. 22. GROSS INCOME.

"(a) *General Definition.* — 'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

"'(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Gifts, bequests, devises and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *"

* * * * *

"(26 U. S. C. 1946 ed., Sec. 22.)

"SEC. 107 [As added by Section 220(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139(a) of the Revenue Act of 1942, *supra*, and Section 119(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

* * * * *

"(b) *Patent, Copyright, Etc.*—For the purposes of this subsection, the term 'artistic work or invention', in the case of an individual means a literary, musical, or artistic composition of such individual or

a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months.

"(c) *Fractional Parts of a Month.*—For the purposes of this section a fractional part of a month shall be disregarded unless it amounts to more than half a month in which case it shall be considered as a month.

* * * * *

"(26 U. S. C. 1946 ed., Sec. 107.)"

Treasury Regulations 111, promulgated under the Internal Revenue Code:

"Sec. 29.22(a)-1. *What Included in Gross Income.*—Gross Income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

"Sec. 29.22(a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, com-

missions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. * * *

* * * * *

"Sec. 29.107-2. [As amended by T. D. 5458, 1945 Cum. Bull. 45.] *Artistic Work or Invention.*—Section 107(b) provides that if, in the taxable year, the gross income of an individual from an artistic work or invention of such individual covering a period of 36 calendar months or more (from the beginning to the completion thereof) is not less than 80 per cent of the sum of (1) the gross income therefrom in the taxable year, and (2) the gross income therefrom in previous taxable years and in the 12 months following the close of the taxable year, then the tax attributable to such gross income in the taxable year shall not be greater than the aggregate of the taxes attributable thereto had it been received ratably over (1) the part of the period of the work which precedes the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter. * * *

* * * * *

"The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

"'*Example (1).* On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, received $36,000 in full payment

for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated in 1940, $12,000 in 1941, and $12,000 in 1942 (the current taxable year).'"

* * * * * *

Federal Rules for Civil Procedure:

"Rule 52 (a)

"In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, * * *."

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No. 388

In the Supreme Court of the United States

OCTOBER TERM, 1951

LEROY J. ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

1. The Government does not oppose the issuance of a writ of certiorari in the above-entitled case.

2. The decision of the court below conflicts in principle with that of the Court of Appeals for the District of Columbia Circuit in *McDermott* v. *Commissioner*, 150 F. 2d 585, on the question whether the prize received by petitioner constituted taxable income. It should be noted, however, that the conflict of opinion arises only from the distinction, drawn by the majority of the court in the *McDermott* case alone, between prizes paid by or on behalf of tax-exempt organizations

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and those awarded by commercial entities.[1] There is no dissent in the lower courts from the proposition that contest prizes awarded by business organizations are taxable to the recipients. And in the Government's view,[2] as well as that of the Tax Court[3] and the court below (R. 54), there is no warrant for the distinction drawn by the majority in the *McDermott* case.

3. There is also a conflict in principle between the decision of the court below and that of the Court of Claims in *Williams* v. *United States*, 84 F. Supp. 362 (C. Cls.), with respect to the manner in which the tax on the prize income should be computed under section 107 (b) of the Internal Revenue Code. The issue is whether, under that section, the income, having been earned over a period of 36 months or more and 80 percent or more having been received in one taxable year, should be apportioned over the 3-year period ending with the taxable year in which it was received, or over the period during which the petitioner's

---

[1] A case involving a contest conducted by a tax-exempt organization is now pending for decision by the Court of Appeals for the Fourth Circuit, having been argued on Nov. 5, 1951. *Amirikian* v. *United States*, decided by the district court Mar. 29, 1951 (1951 C. C. H. Tax Serv., par. 9391).

[2] I. T. 3960, 1949–2 Cum. Bull. 13; see also I. T. 4056, 1951–17 Int. Rev. Bull. 2.

[3] *Stein* v. *Commissioner*, 14 T. C. 494; *Waugh* v. *Commissioner*, decided April 5, 1950 (1950 P–H T. C. Memorandum Decisions, par. 50,095).

work was actually composed.[4] (See R. 54–55). In the course of its opinion in the *Williams* case, the Court of Claims observed that it was presented, in respect of the issue under section 107 (b), with an "unusual situation." 84 F. Supp. at 367.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1951.

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[4] It should be noted that petitioner here testified (R. 22–24) that all the steps necessary to earn the prize had not been taken in the 3-year period to which he would attribute his earnings.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 388

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 29-31) is not reported. The District Court's findings of fact and conclusions of law (R. 8-11) are reported at 93 F. Supp. 660. The opinion of the Court of Appeals (R. 39-45) is reported at 190 F. 2d 680.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1951 (R. 45-46). By order of Mr.

Justice Clark, dated September 12, 1951, the time for filing a petition for a writ of certiorari was extended to November 1, 1951 (R. 46). The petition for a writ of certiorari was filed on October 19, 1951, and was granted on December 11, 1951 (R. 47). The jurisdiction of this Court rests on 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Whether a $25,000 cash prize received by petitioner as the winner of a symphony composition contest constituted gross income as defined in Section 22 (a) of the Internal Revenue Code, or whether it was a gift excluded from gross income by Section 22 (b) (3).

2. Whether, in computing the tax under Section 107(b) of the Internal Revenue Code, the income should be attributed to the thirty-six months ending with the close of the year in which it was received, or to the last thirty-six months of the petitioner's work on the symphony.

STATUTE AND REGULATIONS INVOLVED

These appear in the Appendix, *infra,* pp. 37-41.

STATEMENT

The facts as found by the District Court (R. 8-11) may be summarized as follows:

The petitioner is a musician and composer by profession. During the taxable year 1947, and for many years prior thereto, he was Professor of

Music at Brigham Young University, and later was similarly employed at the University of Utah. In 1936, he commenced work on a symphony named "Trilogy," and completed the work in 1939. Upon its completion, the work was placed in his files along with other completed musical compositions. (R. 8-9.)

In 1945, Henry H. Reichhold, a philanthropist, who was also president of the Detroit Symphony Orchestra, established a "Reichhold Music Award" contest whereby he offered three awards of $25,000, $5,000 and $2,500, respectively, for the best symphonic works written by native-born composers of North, Central, and South America. The underlying purpose of the contest was to further a spirit of understanding among the Pan American nations and to bring to the public the best new music written in the Americas. Winners of the awards were to be selected from among composers who submitted entries in accordance with published terms and conditions of the contest. (R. 9-11, 33-37.) The "Terms and Conditions" of the contest included the following (R. 35):

> 5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.
>
> * * * * *
>
> 10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the com-

poser except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award.

Petitioner entered his composition "Trilogy" in the contest by filing an "Official Entry Blank" on or about February 18, 1946 (R. 9-10, 36). The entry blank which he signed recited the terms and conditions of the contest, and stated that he had read and agreed to all of them (R. 36).

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The composition entered by petitioner was selected by the award committee as the best one submitted, and he received the $25,000 cash award on December 14, 1947 (R. 10).

In his 1947 income tax return, petitioner included the $25,000 prize in his gross income (R. 10). He claimed the benefits of Section 107(b) of the Internal Revenue Code, and in doing so computed the tax as though the $25,000 had been received ratably during the years 1937, 1938, and 1939 (R. 2). Thereafter, he filed a claim for refund on the ground that the prize constituted a non-taxable gift (R. 2-3). The Commissioner rejected this claim, ruling that the prize represented taxable income, and determined a deficiency on the ground that the tax should have been computed under Section 107(b) as though the $25,000 had been ratably received over the three-year period ending with the close of the taxable year 1947 (R. 4). Petitioner paid the deficiency, filed a supplemental claim for refund, and then brought suit for refund (R. 4-6).

The District Court held that the prize received by petitioner constituted a gift and hence, under Section 22(b)(3) of the Internal Revenue Code, was to be excluded from his taxable income (R. 10-11, 29-31). The Court of Appeals reversed, holding that the prize was properly included in petitioner's gross income as defined in Section 22(a), and that the Commissioner had properly computed the tax under Section 107(b) (R. 39-45).

SUMMARY OF ARGUMENT

Petitioner received the $25,000 for a symphony which had taken him over three years to compose and in which he was required to relinquish various property rights to the Detroit Orchestra as a condition of receiving the prize. These undisputed facts afford no basis for the claim that the prize was a gift—given "for nothing", "gratuitously." Accordingly, the court below correctly held that the $25,000 constituted taxable income.

Section 22(a) of the Internal Revenue Code declares broadly that income in any form "derived from any source whatever" shall be taxable. As this Court's decisions make clear, the "obvious purpose" of Congress was "to tax income comprehensively," and the specifically stated exemptions, like the exemption for gifts in Section 22(b)(3), are to be "construed with restraint in the light of the same policy." *Commissioner* v. *Jacobson*, 336 U. S. 28, 48-49. To qualify for tax exemption as a gift, money or property must be received gratuitously, in exchange for nothing. Where, as in this case, a contest invites competitors to submit the products of their labors and promises awards based solely on the excellence of those products, the awards can neither factually nor legally be described as being given "for nothing." Applying the foregoing principles, the decision below correctly approves the long-settled views of the Treasury and the Tax Court that one who com-

petes for and wins a prize receives taxable income, not a gift.

The conclusion that the prize in this case was no gift is reenforced by the fact that petitioner was required, under the terms of the contest, to relinquish in exchange for the prize various property rights in his symphony. It is immaterial that these rights were surrendered to the Detroit Orchestra rather than to the individual who supplied the prize money. For income is taxable to its recipient irrespective of its source or of the ultimate beneficiary of consideration given in exchange. Thus, employees of charitable or educational institutions receive taxable income for their services though their pay commonly comes from donors who receive no financial advantages in exchange. Similarly here, what matters is that no gift was intended or given to petitioner by the supplier of the prize money. Because the $25,000 prize was not given gratuitously, the fact that petitioner's motivations in composing the symphony may not have been dominated by the hope of financial gain is no reason for concluding that this income should be tax-exempt.

The district court's conclusion that the prize was tax-exempt was based primarily upon an erroneous construction of the word "gift" in Section 22(b)(3). Insofar as this error of law is intermingled in the court's decision with the finding, which may fairly be called "factual," that the supplier of the prize intended to make a gift to petitioner, this

finding was squarely refuted by the documentary evidence in the record and was, therefore, clearly erroneous. Accordingly, the reversal of the district court's judgment by the court below was wholly proper.

II

The court below properly held that the tax should be computed under Section 107(b) of the Internal Revenue Code as though the prize had been ratably received over the thirty-six months preceding the close of the taxable year of receipt (1947), as the Commissioner had determined, rather than over the last thirty-six months (1937-1939) in which petitioner had worked on the symphony. The Commissioner's construction of the statutory language is not only a permissible one, but is the one the legislative history shows Congress to have intended. As originally drafted, the language unmistakably required the result achieved in this case. And the amendment altering the terms to those which were enacted was designed, not to change this result, but for the wholly different purpose of avoiding a windfall to taxpayers whose periods of thirty-six months of work required to qualify under Section 107(b) extended beyond the close of the taxable year. In any event, inasmuch as the statute readily bears the Commissioner's interpretation, any ambiguity should be resolved in his favor. For the Section creates an exception from the ordinary rules and

the taxpayer must bring himself within its letter. Petitioner has by no means made the necessary demonstration that the exception allowed him should have been broadened as he claims.

ARGUMENT

I

The Contest Prize Received by Petitioner Constituted Taxable Income, Not a Tax-Exempt Gift

The petitioner, a musician and composer by profession, received a $25,000 cash prize when his symphony, in the composition of which he had worked for over three years, was adjudged the best of those entered in the contest. This prize was the first of "three awards for the best symphonic works * * * written by native-born composers of North, Central and South America," works which had not been "published or publicly performed, either in full or in part, prior to entry" in the contest (R. 34, 35). In compliance with the terms and conditions of the contest, petitioner granted to the Detroit Orchestra various rights and licenses—including "synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings," and the right to designate the publisher—in his winning composition (R. 35, 36). In these undisputed facts there is no basis for the claim that the prize was awarded as a gift—"for nothing", "gratuitously." On the contrary, the prize was awarded, as the contest

terms made clear, for petitioner's "work," and was properly held, therefore, to constitute taxable income.

A. *Prizes won competitively—where the contestants work or submit work products—are not gifts*

Section 22(a) of the Internal Revenue Code (Appendix, *infra,* p. 37) broadly defines gross income as including "gains, profits, and income" derived from compensation for services or from professions or vocations, "of whatever kind and in whatever form paid," and "gains or profits and income derived from any source whatever." Section 22(b)(3) (Appendix, *infra,* p. 37) excludes from gross income "The value of property acquired by gift, bequest, devise, or inheritance."[1] In enacting Section 22(a) Congress intended to exercise to the "full extent" its constitutional power to tax income. *Irwin* v. *Gavit,* 268 U. S. 161, 166; *Helver*v. *Stuart,* 317 U. S. 154, 169; *Douglas* v. *Willcuts,* 296 U. S. 1, 9. Conversely, since tax exemptions are matters of legislative grace, the exclusionary provisions of Section 22(b)(3) must be strictly construed. *Commissioner* v. *Jacobson,* 336 U. S. 28, 48-49. Cf. *Cornell* v. *Coyne,* 192 U. S. 418, 431-432; *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46,

[1] Section 22(a) and 22(b)(3) of the Internal Revenue Code are derived from and are substantially the same as corresponding provisions in Sections 2(a) and 4 of the Revenue Act of 1916, c. 463, 39 Stat. 756.

49; *Helvering* v. *Ohio Leather Co.*, 317 U. S. 102, 106. In *Commissioner* v. *Jacobson, supra,* where it was held that the cancellation of a portion of the taxpayer's indebtedness resulted in taxable gain rather than a non-taxable gift, this Court said (pp. 48-49):

> * * * Both the general provision for taxation of income [Section 22(a)] and this provision for the exclusion of gifts from gross income [Section 22(b)(3)], for income tax purposes, have been in the Federal Income Tax Acts in substantially their present form since the Revenue Act of 1916. The contrast between the provisions is striking. The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy.

Every financial benefit derived from labor constitutes taxable "income" as defined in Section 22(a). *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 729-730; *Commissioner* v. *Smith,* 324 U. S. 177. See also Sections 29.22(a)-1 and 29.22(a)-2 of Treasury Regulations 111 (Appendix, *infra,* p. 39). On the other hand, the plain meaning of the word "gift," as it is used in Section 22(b)(3), "denotes * * * the receipt of financial advantages gratuitously." *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322, 330. See also *Bogardus* v. *Commissioner,* 302 U. S. 34, 41; *Texas*

P. Ry. Co. v. *United States*, 286 U. S. 285, 289-290. Receipts of money or property are not excluded from gross income as gifts, therefore, unless they are received in exchange "for nothing." *Commissioner* v. *Jacobson, supra*, at 51. This practical test remains the same, insofar as the tax liability of the recipient is concerned, whether the payor acts with selfish or altruistic motives (*Helvering* v. *Amer. Dental Co., supra*, at 330-331), and even though the payment is voluntarily made (*Old Colony Tr. Co.* v. *Commissioner, supra*, at 730; *Noel* v. *Parrott*, 15 F. 2d 669 (C. A. 4), certiorari denied, 273 U. S. 754). Accordingly, any form of compensatory payment, whether it is based on services already rendered (and paid for, so as to discharge any contractual obligation to make further compensation) or to be rendered, represents income to the recipient and may not be treated for tax purposes as a gift.[2] A payment does not qualify as a tax-ex-

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[2] See *Bausch's Estate* v. *Commissioner*, 186 F. 2d 313 (C. A. 2); *Van Dusen* v. *Commissioner*, 166 F. 2d 647 (C. A. 9); *Noel* v. *Parrott*, 15 F. 2d 669 (C. A. 4), certiorari denied, 273 U. S. 754; *Baboquivari Cattle Co.* v. *Commissioner*, 135 F. 2d 114 (C. A. 9); *Acme Land & Fur Co.* v. *Commissioner*, 84 F. 2d 441 (C. A. 5); *Mulqueen* v. *Commissioner*, 65 F. 2d 365 (C. A. 2), certiorari denied, 290 U. S. 644; *Nickelsburg* v. *Commissioner*, 154 F. 2d 70 (C. A. 2); *Willkie* v. *Commissioner*, 127 F. 2d 953 (C. A. 6), certiorari denied, 317 U. S. 659; *Thomas* v. *Commissioner*, 135 F. 2d 378 (C. A. 5); *Lee* v. *Commissioner*, 143 F. 2d 4 (C. A. 7); *Poorman* v. *Commissioner*, 131 F. 2d 946 (C. A. 9); *International F. Corp.* v. *Commissioner*, 135 F. 2d 319 (C. A. 2). Conversely, additional compensation voluntarily paid for past services is deductible as a business expense. *Lucas* v. *Ox Fibre Brush Co.*, 281 U. S. 115; Section 29.23(a)-8 of Treasury Regulations 111.

empt gift if the recipient has been required either to do or to give something to earn it.

In harmony with the foregoing principles, the Treasury and the Tax Court have consistently held that one who competes for, and wins, a prize does not thereby receive a gift, but realizes taxable income. I. T. 1651, II-1 Cum. Bull. 54 (1923); I. T. 4667, II-1 Cum. Bull. 83 (1923); I. T. 3960, 1949-2 Cum. Bull. 13; I. T. 3987, 1950-1 Cum. Bull. 9; I. T. 4056, 1951-17 Int. Rev. Bull. 2; *Stein* v. *Commissioner*, 14 T. C. 494; *Brandenburg* v. *Commissioner*, 4 B. T. A. 103; *Waugh* v. *Commissioner*, decided April 5, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,095); *McDermott* v. *Commissioner*, 3 T. C. 929, reversed, 150 F. 2d 585 (C. A. D. C.). These rulings and decisions are grounded upon the plain fact that one who participates in, and wins, a contest receives his prize, not "for nothing," but for the successful labor or services he has performed to be selected as winner.[3]

The fact that contest prizes are "earned" rather than merely bestowed as "gifts" is reflected in

[3] There are, of course, various types of "prizes" and "awards" whose recipients are not required to compete for them and which may qualify as gifts under Section 22(b)(3). Thus, where a person's name was selected by chance, as part of a radio advertising scheme, and she was called by telephone and told that she was to receive a sum of money because of this stroke of good fortune, the Tax Court held the money so received, "without expectation or effort," to be a gift. *Washburn* v. *Commissioner*, 5 T. C. 1333, 1335. And the Treasury has not sought to tax an award for meritorious achievement which is "not a competitive prize." G. C. M. 5881, VIII-1 Cum. Bull. 68 (1929). Cf. note 10, *infra*.

familiar concepts of contract law. One who offers a prize to the winner of a contest and those who accept the offer by entering the contest and complying with its conditions are parties to a valid and enforceable contract based upon mutual consideration. "The competition itself is the agreed exchange for the promised prize." Restatement, Contracts, Section 521, *Comment a.* When his promise of a prize has led people to compete, the promisor is bound both to select a winner and to pay the prize to anyone who may have qualified for it under the terms of the contest. *Palmer* v. *Central Board of Education*, 220 Pa. 568; *Minton* v. *F. G. Smith Piano Co.*, 36 App. D. C. 137; *Groves* v. *Carolene Products Co.*, 324 Ill. App. 102; *Holt* v. *Rural Weekly Co.*, 173 Minn. 337; *Brown* v. *Morrisey & Walker*, 106 N. J. L. 307. There would, of course, be no such obligation if the promise of a prize were no more than a promise to make a gift.[4]

We submit, then, that the long-standing administrative view that a prize won through competition in a contest represents taxable income—

[4] We do not suggest that the absence of consideration renders a payment a gift. On the contrary, it is clear that payments made voluntarily, without consideration in the contract sense, may nevertheless constitute taxable income rather than exempt gifts under the Internal Revenue Code. See *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 730; *Commissioner* v. *Jacobson*, 336 U. S. 28, 51; *Bausch's Estate* v. *Commissioner*, 186 F. 2d 313, 314 (C. A. 2). But where there is consideration—where the payor has assumed a legally enforceable obligation to make the award—an essential element of a gift is lacking. *Nickelsburg* v. *Commissioner*, 154 F. 2d 70, 71 (C. A. 2); *Noel* v. *Parrott*, 15 F. 2d 669 (C. A. 4), certiorari denied, 273 U. S. 754.

a view which has been adopted by the American Law Institute for its Restatement of the Federal Income Tax Statute (Tentative Draft No. 4, April 24, 1951)[5]—is sustained by conclusive factual and legal considerations which exclude such a prize from the category of "gift." Even if the propriety of this administrative application of the Code were less clear than it is, it would carry persuasive weight (cf. *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 52; *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 534), particularly in the light of its endorsement by the Tax Court (cf. *McDonald* v. *Commissioner*, 323 U. S. 57; *Commissioner* v. *Estate of Bedford*, 325 U. S. 283) and of the unchanged reenactments of the applicable statutory provisions since 1916 (cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90; *Brewster* v. *Gage*, 280 U. S. 327). We think, however, that the position of the Treasury and the Tax Court in this instance is plainly required by the Congressional purpose in

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[5] The Restatement provides (Section X105(b) (18)) for inclusion in gross income of "Income from awards, prizes, and similar payments, subject to section X107(h)." The latter section excludes—

> (h) Certain Awards.—Awards, prizes, scholarships, and similar payments—
>
> (1) made primarily in recognition of scientific, educational, civic, or other meritorious achievement, *unless they are in recognition of activity undertaken in candidacy for their receipt or involve substantial future activity directly consequent upon their acceptance;* or
>
> (2) made to further the pursuit by a student of educational, vocational, or similar activities, and not as compensation for services. [Emphasis added.]

Section 22(a) "to tax income comprehensively" and by this Court's admonition that the exemption for gifts "should be construed with restraint in the light of the same policy." *Commissioner* v. *Jacobson, supra,* at 48-49.

B. *The petitioner, paid the promised award when his symphony was adjudged the best of those submitted, and required to relinquish property rights in the symphony in exchange for the prize, received no gift.*

If there could ever be any doubt that the competitive work of a successful contestant requires treatment of his prize as income rather than as a gift, such doubt would have no place here. Far from receiving $25,000 "gratuitously," the taxpayer in this case was awarded this sum because he had, through hundreds of hours of skilled and highly talented effort, produced a symphonic work which was deemed the best of those entered in the contest. The suggestion (Pet. Br. 18-19) that these labors should be ignored because they were performed before announcement of the contest entails a distinction between work and work product which can have no relevance to the problem before the Court. The simple fact of the matter is that the work of a composer, like many kinds of work, is such that it can be recorded, stored, and saved for subsequent use or sale or entry in a contest. It was precisely this type of *work*—explicitly described as such in the contest terms (R. 34, 35, 36,

37)—which the contest elicited and for which the prize was awarded. And so, wholly apart from the effort and expense to petitioner in having photostats made of his score (R. 21), in completing an entry blank (R. 36), and in mailing a copy of the composition for entry in the contest, the fact that it was work he submitted and work for which the prize was paid negates his contention that he received a gift.[6]

Still another factor in this case independently compels the same conclusion. Under the published terms and conditions of the contest, which petitioner was required to—and did—accept in order to be eligible for the prize, he granted to the Detroit Orchestra various rights and licenses in his composition (R. 35-36). These rights—including "all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls," the "exclusive right to authorize the first performance" of the composition, the "exclusive right to designate the publishers," and the right to give "at least one broadcast performance" within a year after the award—comprised a significant portion of the legally protected interests a composer has in the music he has created. No

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[6] For similar reasons, we believe the court erred in *McDermott* v. *Commissioner*, 150 F. 2d 585 (C. A. D. C.), upon which the taxpayer here relies heavily (Br. 11-14), in holding that a prize awarded in an essay contest was a gift, not taxable income. See pp. 21-25, *infra*.

stretch of language or excess of modesty can reduce them to "nothing" or justify the contention that the prize for which petitioner was required to relinquish them was given "gratuitously." Nor is it of any consequence that the Detroit Orchestra may have realized little or no financial gain from its acquisition of these rights (see Pet. Br. 11); as with similar rights in any work of art, the law recognizes their substance and affords them protection regardless of the value they may ultimately be assigned in the market-place.

The conclusion that the prize for which such rights were exchanged was not a gift is in no way altered by the fact that the Orchestra (and the public generally) rather than the payor of the prize (Reichhold) received the benefits of petitioner's music and of his rights therein (see Pet. Br. 10, 14, 18, 20). All that matters is that petitioner received the prize and that it was not, in the language of Section 22(b)(3), "acquired by gift * * *." For income is taxable to its recipient irrespective of who pays it or who derives the benefit of consideration given in exchange. Cf. *Baboquivari Cattle Co.* v. *Commissioner*, 135 F. 2d 114, 116 (C. A. 9); *Acme Land & Fur Co.* v. *Commissioner*, 84 F. 2d 441, 442 (C. A. 5); *Stein* v. *Commissioner*, 14 T. C. 494. Thus, services rendered by employees of an educational or charitable institution (*e. g.*, by a university professor or a hospital doctor) inure to the benefit of the institution

and the public it serves, not to those who endow the institution; yet the compensation paid for such services—whether by the institution out of funds already donated to it or by a donor on its behalf—unquestionably constitutes taxable income to the recipients.[7] Similarly here, the prize petitioner received for his winning composition no more represents a tax-free gift than the compensation received by musicians in the Detroit Orchestra for playing it—though the funds in both cases may well have emanated from the same philanthropically inspired source.

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[7] As the Tax Court observed in the *Stein* case, *supra*, a decision concurred in by the full court (pp. 500-501):

> * * * Any suggestion or thought that the mere fact that the money received by the ultimate recipient was supplied by way of gift or donation is alone sufficient to indicate or supply a basis for holding that as to the recipient the amount received was not income is, in our judgment, clearly outside the statute. One person may, for instance, by way of gift supply the money to pay some needy person for mowing the grass in his friend's yard, but no one would suggest that the money received by the mower of the grass was not to him income. Thousands of people every year make contributions to community funds and foundations and, even though as to the donors they are admittedly gifts, no one, we think, would seriously argue that the individuals engaged and employed in administering charity and supervising and directing the recreational activities of others and who are paid from these gifts and donations did not receive income within the meaning of the Constitution and the statute. It is accordingly our view that in the *McDermott* case, as well as in the argument here, too much importance was placed on the question whether the original furnisher of the money intended to make a gift and too little attention was paid to the question whether there was as to the recipient gain or compensation from labor or work at a business or profession.

No amount of emphasis upon the "philanthropic purposes" (Pet. Br. 14) of Reichhold can obscure the critical fact that these purposes did not result in the making of any gift to the petitioner. What Reichhold intended was to foster international amity through music and to dedicate to the public (through the Detroit Orchestra) the best new symphonic music written by American composers, as appears from the published purpose and rules of the contest (R. 33, 35). To accomplish that end Reichhold undertook, through a contest, to procure the production and submission of theretofore unpublished and unperformed symphonies, offering large money awards for the winning selections as inducements. In addition, he stipulated that various rights in the symphonies selected were to be surrendered to the Detroit Orchestra by the successful contestants. In substance and effect, he paid for the work and purchased the rights of the winning contestants with the prize money he supplied, and donated the rights to the Orchestra. That his purposes were philanthropic in a real sense is clear; it is equally clear however, that this philanthropy brought no gratuity to the present taxpayer. The public-spirited citizens who order monuments for the parks or finance picnics for underprivileged children make philanthropic donations. But the sculptors and grocers, like the petitioner in this case, whose goods and services the philanthropist procures and bestows, receive taxable income, not gifts, in return.

Mistakenly identifying himself as the object of Reichhold's donative intent, petitioner relies in vain upon this Court's decision in *Bogardus* v. *Commissioner*, 302 U. S. 34. There, holding that a payment by a corporation (Unopco) to former employees of a predecessor corporation as a "gift or honorarium" was a gift rather than compensation, the Court said (302 U. S. at 41):

> And most significant is the further stipulated fact that the disbursements were *not made or intended to be made* for any services rendered or to be rendered or for any consideration given or to be given by any of said employees, attorneys or experts to said Unopco corporation or to any of its stockholders. * * * There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act.

Here, where the sole bases for the payment were petitioner's work and his relinquishment of property rights in that work, the decision in *Bogardus* serves only to point up the conclusion that the prize was not "acquired by gift * * *." For here there was consideration and both a moral and legal duty to pay the prize which had been promised for the work the contest solicited.

We think the contrary view announced in *McDermott* v. *Commissioner*, 150 F. 2d 585 (C.A.D.C.)

(Chief Judge Groner dissenting), is erroneous.[8] In that case, involving an essay contest prize awarded by the American Bar Association as a testamentary trustee, the court, pointing out that the Association derived no profit from the contest and that "the entire advantage accrued to petitioner [the prize winner] and the community," concluded that this "distinguishes" the contest from "contests operated for commercial purposes." 150 F. 2d at 588. But this distinction, whatever significance it may have elsewhere, affords no ground for concluding that the taxpayer whose work or services have redounded to the public benefit receives a tax-free gift when the prize he is awarded is given solely and precisely for the product of his labors, and not in any sense "for nothing." As we have shown above (pp. 18-20), income which is not in fact "acquired by gift" is not transformed into a tax-free gift because its payor derives no economic benefit from the payment.[9]

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[8] The *McDermott* case was followed in *Amirikian* v. *United States*, 100 F. Supp. 263 (D. Md.), pending on appeal to the United States Court of Appeals for the Fourth Circuit. In its opinion in *Amirikian*, rendered before the decision of the court of appeals below, the court also relied on the district court's decision in the instant case.

[9] It does not appear that the prize-winning essayist in the *McDermott* case was required to transfer any rights in his essay as a condition of receiving the prize. In this respect, the instant case contains additional grounds for rejecting the claim that the prize was a gift. We urge, however, that this added factor, while it would seem in itself sufficient to destroy the contention that the prize was received "for nothing," could

Equally mistaken, we believe, is the view of the majority in the *McDermott* case that, because it seemed "safe to say that the dominant motive of a normal contestant for this prize is not a hope of immediate financial gain" (150 F. 2d at 588), there was reason to consider the prize a gift. It is undoubtedly true that many educators, authors, artists, and others are led to their work by motives more lofty than the hope of monetary reward. But there is nothing in the Internal Revenue Code to suggest that the incomes derived from such work are to be treated as tax-exempt gifts.[10]

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be eliminated without altering the correctness of the decision below. Our position is that because the symphony in this case and the essay in *McDermott* were work products solicited and rewarded in the contests, the prizes in both instances were not gratuitous and hence were not gifts.

[10] As further support for its decision, the court, in the *McDermott* case, observed that the Commissioner "does not say that taxes have ever been collected on Nobel prizes, Guggenheim fellowships, Rhodes scholarships, Ross prizes, or any of the many scholarships and prizes which, like these, have long been awarded on a competitive basis to scientists, scholars, or students." Relying on this observation, petitioner argues (Br. 13-14) "that there is no more real reason to tax the award as income in this case than in the cases of 'Nobel prizes, Guggenheim fellowships, Rhodes scholarships,'" etc. This argument blandly assumes a factual identity between the enumerated "prizes" and "awards" and the contest prize involved here—an identity which clearly does not exist. (Cf. note 3, p. 13, *supra*.) Thus, even superficial examination of the Nobel and Rhodes grants reveals that to treat them as exempt from tax is in no way inconsistent with taxation of the contest prize in this case.

1. "The Nobel prizes * * * are not competitive." 16 *Encyclopedia Britannica* 477 (1951). Candidates enter no contest and submit no work; instead, prescribed institutions or persons make nominations to specifically designated prize-awarding institutions. Henriksson, *The Nobel Prizes and their Founder* (Alb. Bonniers Boktryckeri, Stockholm, 1938),

The Treasury has announced its intention not to follow the *McDermott* decision (I. T. 3960, 1949-2 Cum. Bull. 13); the Tax Court has seriously questioned its reasoning (*Stein* v. *Commissioner*, 14 T. C. 494; *Waugh* v. *Commissioner*, 1950 P-H T. C. Memorandum Decisions, par. 50,095); and

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pp. 8-10. Not only are entries neither sought nor submitted by contestants, but there is no promise of a prize to anyone to be selected from any group. Prizes may be, and are in fact, withheld in years when the awarding authorities see fit to make no selection. 16 *Encyclopaedia Britannica* 477-477B (1951).

2. Even more clearly, Rhodes scholarships are not awarded as prizes in contests in which candidates submit work and are rewarded for their work. Rhodes scholars are chosen on the basis of personal qualifications. 19 *Encyclopaedia Britannica* 266, 267 (1951). And while the selection is "competitive" in the sense that few are chosen though many wish to be, the successful candidate's superior qualifications are in no sense "consideration" for the scholarship, but are more appropriately described (in fact as well as in law) as the "condition" of the award. See 1 Williston, *Contracts* (rev. ed., 1936) § 112. It seems clear, therefore, that petitioner here is not helped by the view of the Bureau of Internal Revenue that where "a grant or fellowship is made for the training and education of an individual, either as a part of his program in acquiring a degree or in otherwise furthering his educational development, *no services being rendered as consideration therefor*, the amount of the grant is a gift which is excludable from gross income." I. T. 4056, 1951-17 Int. Rev. Bull. 2, 4 (emphasis added).

As for Guggenheim fellowships, these would appear to be taxable (under I. T. 4056, *supra*) on the ground that they are granted for work which the recipients are expected to perform, their basis being some specified project of research or creative activity. Cf. *Banks* v. *Commissioner*, 17 T. C. No. 167. It seems unnecessary here to consider the factual details of the Guggenheim awards to determine the propriety of holding them taxable. What is presently important is that where a contest (1) solicits work, (2) offers and pays a prize for the work, and (3) requires the surrender of property rights in the work in exchange for the prize, the prize cannot be deemed a gift.

in the instant case—the first occasion upon which the question has been re-presented to an appellate court—the court below has rejected it. We submit that the court below was correct—that unless the meaning of the word "gift", is to be stretched far beyond its meaning in common speech and in this Court's decisions construing Section 22(b)(3) of the Internal Revenue Code, a prize which is offered and paid for the product of talented professional labor is taxable income to its recipient.

C. *Based upon the application of an incorrect interpretation of "gift" in Section 22(b)(3) to uncontroverted facts, the judgment of the district court was properly reversed by the court below.*

As the court below pointed out (R. 39), the facts necessary to decision in this case are undisputed. Applying to these undisputed facts a mistaken view of the law, the district court misconstrued the meaning of the word "gift" in Section 22(b)(3) and drew from this misconstruction its conclusion that the prize petitioner received was not taxable income. Because the district court's decision was predicated upon "erroneous legal standards," its reversal by the court below was clearly proper. *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322, 330. For the exemption of gifts in Section 22(b)(3) does not leave the trial court "free to determine at will or upon evidence and without judicial review

the tests to be applied to facts to determine whether the result is or is not a gift.'" *Id.* at 331. Cf. *Commissioner* v. *Jacobson*, 336 U. S. 28.[11]

That the conclusions of the district court held erroneous by the court below were primarily conclusions of law rather than fact becomes apparent from a brief analysis of the two decisions in the light of the undisputed facts. And insofar as the district court's decision may be said to have entailed factual inferences, such inferences were "clearly erroneous" and were correctly rejected by the court below.[12]

1. In support of its decision, the district court pointed out (R. 10, 29-31) that petitioner's symphony was not originally composed for the contest and was not produced with the expectation of financial gain. Without questioning these facts (see R. 41), the court below held that petitioner's motivations when he wrote the symphony could not render the prize he was paid for it a gift (R. 43). We think the opinion below and our arguments here (pp. 16-17, 23 *supra*) sufficiently demonstrate the correctness of this conclusion.

2. The district court was of the opinion (R. 10, 29-30) that the prize was a gift because its payor (Reichhold) derived no financial gain from the

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[11] In the *McDermott* case, upon which petitioner relies here, the Court of Appeals, reversing the Tax Court, treated as an issue of law the question whether the essay contest prize there involved was a gift.

[12] Rule 52(a), Fed. Rules Civ. Proc.; *United States* v. *Gypsum Co.*, 333 U. S. 364, 395-396; *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342.

contest. Agreeing that Reichhold sought no tangible benefit for himself, the court below properly ruled that this made no difference, that petitioner had nevertheless "received the prize as a result of his labors just as much as though he had sold it or had been paid for its use" (R. 44). See pp. 18-22, *supra*.

3. In his findings of fact and opinion, the district judge stated that Reichhold's purpose was to "'give'—not to employ or to buy or sell" (R. 10, 30). This statement would seem to be simply a reiteration of the erroneous legal conclusion that there had been a gift. But if this finding, with its reference to Reichhold's "purpose," might be considered a factual finding of an intent to bestow a gift upon petitioner, it is nevertheless without support in the record. The only evidence of Reichhold's purpose is found in the terms of the contest he sponsored, and it is clear that these contemplated no gift to the winner of the contest. Misdescription of the contest purpose as gift-making cannot alter the undisputed fact that the prizes were promised and paid for symphonic works and for rights in those works.

4. The district court's assertion (R. 31) that petitioner's grant of rights in his composition to the Orchestra "hasn't anything to do with the twenty-five thousand dollar prize" may fairly be described as a finding of fact and presumably accounts in part for the court's decision. But this finding is flatly refuted by the documentary evi-

dence, which is the only evidence on the point, and must be rejected as clearly erroneous. Under paragraphs 10 to 13 of the "Terms and Conditions" of the contest (R. 35) as well as paragraphs 4 to 6 of the "Official Entry Blank" petitioner signed (R. 36), each contestant obligated himself, in the event his entry received an award, to grant the specified rights to the Orchestra. This obligation was positive and unequivocal. It was admittedly fulfilled by petitioner (R. 10). The conclusion that it hadn't "anything to do" with the prize is wholly baseless. At any rate, even if it were correct, this conclusion would not support the decision that petitioner had received a gift. For, as the court below pointed out (R. 43-44), petitioner's professional efforts in writing the symphony and his participation in the contest are in themselves sufficient to prevent treatment of the prize as a gratuity. See pp. 16-17 and note 9, *supra*.

II

The Commissioner and the Court Below Correctly Ruled That the Prize Was to Be Taxed Ratably Over the Thirty-six Months Ending with the Close of the Year in Which It Was Received, Not Over the Last Thirty-six Months of the Time During Which Petitioner Worked on the Symphony

Income must be reported by a taxpayer on the cash basis in the taxable year of its receipt, regardless of when it is earned. Section 107 of the Internal Revenue Code is designed to grant relief from this

requirement, under certain conditions, to taxpayers who perform work over an extended period but receive the bulk of their compensation in a single taxable year. Section 107(a) deals with compensation for personal services, while Section 107(b) (Appendix, *infra*, pp. 38-39),[13] involved here, deals with income from an "artistic work or invention."

The first sentence of Section 107(b) defines an "artistic work or invention", for purposes of this subsection, as one "the work on which * * * covered a period of thirty-six calendar months or more * * *." The remaining sentence then provides that if in the taxable year the taxpayer's income from an artistic work or invention is not less than eighty percent of the income "in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year," then the tax attributable to the income of the taxable year may be computed as though it had "been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months."

It is undisputed that petitioner is entitled to the benefit of Section 107(b). The issue here is whether petitioner's $25,000 prize should be taxed ratably over the thirty-six months ending with the close of the taxable year (1947) in which it was

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[13] Section 107(b) was added to the Code by Section 139(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 837.

received, as the Commissioner ruled, or over the last thirty-six months (1937-1939) of the period during which petitioner wrote the symphony, as he claims. We think the court below was correct in sustaining the Commissioner's ruling.

Read naturally, the provision permitting apportionment of income in the second sentence of Section 107(b)—"ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months"—would seem to refer to a period ending with the close of the taxable year and extending back a maximum of thirty-six months, as the Commissioner and the court below have held. And when the legislative history of the language is examined, it becomes apparent that this is what Congress meant. As originally introduced, the phrase in question read "ratably over the period of thirty-six calendar months ending with the close of the taxable year." H. R. 7378, 77th Cong., 2d Sess., Sec. 128. In that form the language unquestionably accomplished the result for which we contend. Changing the words to those which were enacted into law, the Senate Committee on Finance explained that the amended terms provided for permissible taxation of the kind of income affected as though it had "been received ratably over (1) the part of the period of the work which preceded the close of the taxable year, or (2) a period of 36 calendar months, *whichever of such periods is the shorter.*" S. Rep. No. 1631, 77th

Cong., 2d Sess., p. 109. (Emphasis added.) [14] Agreeing to this change in conference, the conferees said of it simply that it "clarifies the language of the House bill." H. Conf. Rep. No. 2586, 77th Cong., 2d Sess., p. 42.

These developments strongly support the conclusion that the Senate amendment was not designed to change the allowable period of allocation from one ending with the close of the taxable year to one covering any 36 months in the past when work on the artistic product or invention was done. Instead, the amendment was intended to deal with situations where part of the 36 months of work required to qualify the income from the artistic product for the benefits of Section 107(b) occurs after the close of the taxable year. Compare *Example (1)* with *Example (2)* under Section 29.107-2, Treasury Regulations 111, Appendix, *infra*, pp. 40-41). In such cases, under the House version, the taxpayer would have been entitled to prorate his income back over a full 36 months, a period greater than the period of his work preceding the close of the taxable year. That it was this kind of windfall the Senate amendment was intended to prevent is made unmistakably clear by the fact that

[14] Treasury Regulations 111, Sec. 29.107-2 (Appendix, *infra*, p. 40), in which petitioner claims to find support for his position (Br. 25), follow the quoted language of the Senate report practically verbatim. As we show in the text following, and as the Commissioner's application of the regulation further demonstrates, this language was not designed for the purpose to which petitioner would put it.

both the language adopted and the explanatory Senate Committee Report contemplate apportionment over a *maximum* of 36 months, anticipating cases where the allowable period will be shorter. Since an artistic work or invention does not qualify at all under Section 107(b) unless its completion required 36 months or more of work, the coupling of the 36-month limit with the requirement that it be "that part of the period preceding the close of the taxable year" (Section 107(b)) can only be explained by reference to cases of the type we describe.

Focusing on such cases, it was appropriate for the Senate Committee to refer to "the part of the period of the work which preceded the close of the taxable year * * *." For the draftsmen's attention was directed to periods of work surrounding the close of the taxable year, and their concern was to prevent tax diminution by proration of income over a period greater than the duration of the work preceding the close of the taxable year. We think the nature of the amendment and the explanation for it indicate (1) that the legislators were not considering the case, like the one here, where the period of the work ends before the taxable year, and (2) that there was no intention to alter the House bill's provision that the allowable period for attribution of income should be a period ending with the close of the taxable year.

This view seems particularly compelling in the light of the Conference Report's declaration that

the Senate amendment had merely "clarified" the provision in the House bill. While the present litigation suggests that the clarification may not have been wholly felicitous, it is scarcely reasonable to suppose that the conferees would have so innocuously described such a relatively drastic change as alteration of the allowable period from one ending with the close of the taxable year to one determined by selecting 36 months from an anterior period when the work was done.

Moreover, if the amendment was designed for the result petitioner urges, it is unlikely that Congress would have provided for allocation to 36 months of the period of actual work without indicating *which* months were to be selected when the "period preceding the close of the taxable year" exceeded 36 months. In a supposed case where the total period of work consisted of 40 months, 28 preceding and 12 following the close of the taxable year, it is perfectly clear what Congress intended when it limited allocation to "*that part* of the period preceding the close of the taxable year * * *." But where, as in this case, the period of actual work exceeds 36 months (here, from the fall of 1936 through 1939), and the entire period precedes the close of the taxable year, to which "part" was Congress referring? The statute does not say—because, in our view, Congress intended that the period of allocation should extend in every case from the close of the taxable year to a date not more than 36 months prior thereto.

Petitioner, applying his interpretation of the statute, has supplied the omission that interpretation leaves by claiming that the prize money should be taxed as though it had been received ratably over the 36 months of the years 1937 through 1939. But nothing in Section 107(b) explains why this period rather than the 36 months beginning with the fall of 1936 should be chosen. Indeed, the incompleteness of the scheme created by petitioner's construction is nowhere better illustrated than by petitioner's own statement (Br. 25) that allocation should be allowed "under any combination of months equaling thirty-six in which the work was performed."

In *Williams* v. *United States*, 84 F. Supp. 362, which adopts petitioner's view,[15] the Court of Claims concluded that the expression " 'the period' in the second sentence [of Section 107(b)] refers, grammatically and logically, to the period referred to in the first sentence, which is the period when the work was done." 84 F. Supp. at 367. The court went on to observe that "the fact that the period

[15] Though they are also relied upon by petitioner (Br. 26), neither *Richardson* v. *Commissioner*, 14 T. C. 547, nor *Terrell* v. *Commissioner*, 14 T. C. 572, involved the issue presented here. In the *Richardson* case, the income was received in the same year in which the work was completed, and the only question was whether the work had extended over a period of thirty-six months as required by the first sentence of Section 107(b). The *Terrell* case involved Section 107(a), the provisions of which differ from those of Section 107(b), and the only issue was whether the amount received in the taxable year met the requirement that it be eighty percent of the total compensation received.

referred to in the second sentence must precede the close of the taxable year suggests that it should immediately precede it," but concluded that the "grammatical and logical" import of the language overrode this suggestion. *Ibid.* The court conceded, moreover, that the Senate amendment to the House bill "may have been made primarily to limit the period of computation to the actual time of work * * * preceding the close of the taxable year, in a case where in fact some of the necessary thirty-six months of work took place after the taxable year * * *." *Ibid.* It held, however, that the language adopted in the amendment must be read as working the further result for which petitioner argues here.

Without repeating the countervailing arguments presented above, we submit that insofar as considerations of language, grammar, logic, and legislative history leave the issue, at the very least, doubtful, the doubt should be resolved in favor of the Commissioner's construction. For, as petitioner acknowledges (Br. 27), Section 107(b) "constitutes an exception to the general rules governing the taxation of income," and the "taxpayer claiming its benefits must bring himself within the letter of the Congressional grant." *Lindstrom* v. *Commissioner*, 149 F. 2d 344, 346 (C. A. 9). As Judge Learned Hand wrote, "the section is an exemption and as such must submit to close scrutiny; and—what is more important—Congress has been sparing in the relief given."

Smart v. *Commissioner*, 152 F. 2d 333, 335 (C. A. 2), certiorari denied, 327 U. S. 804. Here, where the language Congress wrote readily bears the Commissioner's construction, where legislative history testifies that this construction meets the critical test of fulfilling the Congressional purpose, and where the taxpayer's proposed alternative raises doubts which are in no way eased by the grammar and logic he invokes, petitioner has failed to sustain the burden of showing entitlement to a greater benefit than he has been allowed.

CONCLUSION

The judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
ELLIS N. SLACK,
Acting Assistant Attorney General.
MARVIN E. FRANKEL,
HARRY BAUM,
Special Assistants to the Attorney General.

MARCH 1952.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(3) [As amended by Section 111(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Gifts, bequests, devises and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 107 [As added by Section 220(a) of the

Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Section 139(a) of the Revenue Act of 1942, *supra*, and Section 119(b) of the Revenue Act of 1943, c. 63, 58 Stat. 21].

COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

* * * * *

(b) *Patent, Copyright, Etc.*—For the purposes of this subsection, the term "artistic work or invention," in the case of an individual means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close

of the taxable year but not more than thirty-six calendar months.

* * * * *

(26 U.S.C. 1946 ed., Sec. 107.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Section 29.22(a)-1. *What Included in Gross Income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * *

* * * * *

Section 29.22(a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. * * *

* * * * *

Section 29.107-2. [As amended by T. D. 5458, 1945 Cum. Bull. 45]. *Artistic Work or Invention.*—Section 107(b) provides that if, in the taxable year, the gross income of an individual from an artistic work or invention of such individual covering a period of 36 calendar months or more (from the beginning to the completion thereof) is not less than 80 per cent of the sum of (1) the gross income therefrom in the taxable year, and (2) the gross income therefrom in previous taxable years and in the 12 months following the close of the taxable year, then the tax attributable to such gross income in the taxable year shall not be greater than the aggregate of the taxes attributable thereto had it been received ratably over (1) the part of the period of the work which precedes the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter. * * *

* * * * *

The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

Example (1). On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, receives $36,000 in full pay-

ment for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated in 1940, $12,000 in 1941, and $12,000 in 1942 (the current taxable year).

Example (2). Assume the same facts as in example (1) except that the period of work was commenced by A on July 1, 1941, and completed on September 1, 1944. Although the period of work covers 38 calendar months, allocations may be made to only the 18 calendar months which are included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $2,000 ($36,000 divided by 18) must be allocated to each of 18 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated to 1941, and $24,000 to 1942 (the current taxable year).

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